Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1217

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH P. RUSSONIELLO, ET AL., PETITIONERS

v.

JOSE J. OLAGUES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
DONALD B. AYER
Deputy Solicitor General
GLEN D. NAGER
Assistant to the Solicitor General
MICHAEL JAY SINGER
JAY S. BYBEE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a federal court may, consistent with Article III of the Constitution, consider a pre-indictment challenge to the manner and scope of noncoercive investigatory activities by a United States Attorney.

2. Whether, assuming that Article III in some circumstances allows for pre-indictment judicial review of the manner and scope of noncoercive investigatory activities by a United States Attorney, a federal court may enjoin or declare unconstitutional such activities when those activities were not taken in bad faith or for purposes of harassment, do not violate any clearly established rights, and have not been shown to be devoid of legitimate investigatory purpose.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
Reasons for granting the petition	11
Conclusion	28
Appendix A	1a
Appendix B	39a
Appendix C	41a
Appendix D	76a
Appendix E	77a
Appendix F	78a
Appendix G	96a

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984) 12, 13, 17, 20, 23
Baker v. *Carr*, 369 U.S. 186 (1962) 13
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 15
Blackledge v. *Perry*, 417 U.S. 21 (1974) 15
Blair v. *United States*, 250 U.S. 273 (1919) 18
Bordenkircher v. *Hayes*, 434 U.S. 357 (1978) 14, 15
Boyle v. *Landry*, 401 U.S. 77 (1971) 25
Branzburg v. *Hayes*, 408 U.S. 665 (1972) 15, 18
Butz v. *Economou*, 438 U.S. 478 (1978) 18, 21
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 23, 24, 25
Coleman v. *Miller*, 307 U.S. 433 (1939) 13
Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868) 14
Cook v. *Houston Post*, 616 F.2d 791 (5th Cir. 1980) 18
Costello v. *United States*, 350 U.S. 359 (1956) 18
Dombrowski v. *Pfister*, 380 U.S. 479 (1965) 23
Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) 27
Flast v. *Cohen*, 392 U.S. 83 (1968) 13

Cases – Continued: Page

Forsyth v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), cert denied, 453 U.S. 913 (1981) 18
FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980) 16, 20, 21, 25
Grand Jury of the Southern District, In re, 508 F. Supp. 1210 (S.D. Ala. 1980) 24
Grand Jury Subpoena to Central States, In re, 225 F. Supp. 923 (N.D. Ill. 1964) 24
Hale v. *Henkel*, 201 U.S. 43 (1906) 18
Heckler v. *Chaney*, 470 U.S. 821 (1985) 14, 17
Imbler v. *Pachtman*, 424 U.S. 409 (1976) 21
Jett v. *Casteneda*, 578 F.2d 842 (9th Cir. 1978) 7, 17, 24
Jones v. *Unknown Agents of the Federal Election Comm'n*, 613 F.2d 864 (D.C. Cir. 1979), cert. denied, 444 U.S. 1074 (1980) 20
Kugler v. *Helfant*, 421 U.S. 117 (1975) 22, 23, 26, 27
Laird v. *Tatum*, 408 U.S. 1 (1972) 15, 16, 17, 20, 25
LaRouche v. *Webster*, 566 F. Supp. 415 (S.D.N.Y. 1983) 17, 20, 24
Leeke v. *Timmerman*, 454 U.S. 83 (1981) 15
Levitt, Ex parte, 302 U.S. 633 (1937) 16
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 13, 15
Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 17
McDonald, Sommer & Frates v. *County of Yolo*, No. 84-2015 (June 25, 1986) 13, 16
Nathan v. *Smith*, 737 F.2d 1069 (D.C. Cir. 1984) 17
Newman v. *United States*, 382 F.2d 479 (D.C. Cir. 1967) 14
Oetjen v. *Central Leather Co.*, 246 U.S. 297 (1918) 13
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1946) 15
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 23, 25
Perez v. *Ledesma*, 401 U.S. 82 (1971) 22
Petroleum Exploration, Inc. v. *Public Service Comm'n*, 304 U.S. 209 (1938) 20
Pollard v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.), aff'd, 393 U.S. 14 (1968) 24
Powell v. *McCormack*, 395 U.S. 486 (1969) 12
Reporters Committee for the Freedom of the Press v. *American Telephone & Telegraph*, 593 F.2d 1030 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979) 17, 24

Cases – Continued: Page

Rizzo v. *Goode*, 423 U.S. 362 (1976) 23
Samuels v. *Mackell*, 401 U.S. 66 (1971) 27
Steffel v. *Thompson*, 415 U.S. 452 (1974) 27
Trainor v. *Hernandez*, 431 U.S. 434 (1977) 23
United States v. *Batchelder*, 442 U.S. 114 (1979) 14
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 26
United States v. *Calandra*, 414 U.S. 338 (1974) 18, 19
United States v. *Dionisio*, 410 U.S. 1 (1973) 18, 19
United States v. *Goodwin*, 457 U.S. 368 (1982) 18
United States v. *Lovasco*, 431 U.S. 783 (1977) 21
United States v. *Nixon*, 418 U.S. 683 (1974) 14
United States v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) 18
United States v. *Thompson*, 251 U.S. 407 (1920) 14
Valley Forge Christians College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 12, 13
Vander Jagt v. *O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983) ... 13
Wayte v. *United States*, 470 U.S. 598 (1985) 14, 15, 21
Wygant v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986) 26
Yaselli v. *Goff*, 12 F.2d 396 (2d Cir. 1926) 18
Younger v. *Harris*, 401 U.S. 37 (1971) 20, 22, 23, 24, 25

Constitution and statutes:

U.S. Const.:
Art. II 2, 13
§ 3 14
Art. III 11, 12, 15, 17
§ 2 12
Amend. I 10, 22, 28
Amend. V (Due Process Clause) 2
Amend. XIV (Equal Protection Clause) 26
Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701 *et seq.* 16
8 U.S.C. 1423(1) 4
42 U.S.C. 1973aa-1a(c) 4
42 U.S.C. 1973i(c) 2
42 U.S.C. 1973i(d) 3

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

JOSEPH P. RUSSONIELLO, ET AL., PETITIONERS

v.

JOSE J. OLAGUES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Joseph P. Russoniello and David Ilchert, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc Court of Appeals for the Ninth Circuit (App., *infra,* 1a-38a) is reported at 797 F.2d 1511. The prior panel opinion of the court of appeals (App., *infra,* 41a-75a) is reported at 770 F.2d 791. The opinion of the United States District Court for the Northern District of California on summary judgment (App., *infra,* 78a-95a) is unreported. The opinion of the district court on motion to dismiss (App., *infra,* 96a-97a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1986. A suggestion for rehearing en banc by the full court of appeals was denied on December 19, 1986. On November 14, 1986, Justice O'Connor granted an extension of time to and including January 23, 1987 for

the filing of a petition for a writ of certiorari in this case. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America.
>
> * * * * *
>
> * * * he shall take Care that the Laws be faithfully executed * * *.

The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

42 U.S.C. 1973i(c) provides in pertinent part:

> Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives * * *.

STATEMENT

1. Petitioner, Joseph P. Russoniello, is the United States Attorney for the Northern District of California (App., *infra,* 3a), and petitioner, David Ilchert, is the District Director in San Francisco for the United States Immigration and Naturalization Service (*id.* at 5a). In March 1982, Russoniello received information from the Santa Clara County district attorney which indicated that a substantial number of foreign-born persons who were not United States citizens recently had registered to vote in that county, even though as noncitizens they were ineligible to do so (*id.* at 25a). Upon inquiry, Russoniello was further informed that many of these noncitizen registrants either did not speak or were not fluent in English and that many had been told by the persons registering them that they were in fact eligible to vote, either because they were married to a United States citizen or because they had resided in this country for a long period (*id.* at 25a-26a). Based on these facts, Russoniello became concerned that certain persons or organizations were registering or conspiring to register noncitizen voters in violation of 42 U.S.C. 1973i(c) and (d), a statute that he is responsible for enforcing (App., *infra,* 3a-4a, 25a-26a).

Accordingly, on April 19, 1982, Russoniello requested that the district attorneys and voter registrars in nine counties assist him in investigating the extent of noncitizen voter registration in the San Francisco Bay area (App., *infra,* 26a, 78a-80a). Russoniello explained that, based on the information he had seen, persons who did not understand English were quite susceptible to being confused or misled about their eligibility to vote[1] and that such non-

[1] Russoniello later learned that the Spanish translation of the voter registration form being used in these counties erroneously stated that a registrant "should" be, rather than "must" be, a United States citizen

citizen registrants could be identified by their requests for bilingual ballots (*id.* at 79-80a).[2] He proposed that the voter registrar in each county randomly select from public records and submit to him the names of 25 recently-registered, foreign-born voters who had requested bilingual voting ballots, which he would forward to the Immigration and Naturalization Service (INS) for verification of the registrants' citizenship status (*ibid.*). Russoniello further suggested that, as to registrants whom INS could not positively identify as citizens, the district attorneys should contact the registrants, determine whether they were citizens and, if not, determine who, if anyone, had encouraged them improperly to register (*id.* at 43a, 80a). He advised that, while he did not intend to prosecute any of the noncitizen registrants, he would seriously "consider" prosecuting any group or individual who had deliberately conspired to register unqualified voters (*ibid.*).

The voter registrars subsequently submitted a total of 168 names to Russoniello, which he forwarded to INS (App., *infra,* 43a). By reviewing its records, INS determined that 55 of these persons were United States citizens, that 45 were not citizens or were probably not citizens, and that no records existed for the remaining 68 persons (*id.* at 80a). Russoniello conveyed this information to the local district attorneys in late May 1982 and again asked that

---

(App., *infra,* 79a). This fact confirmed Russoniello's suspicion that registration irregularities were most likely to occur among those who did not speak English (*id.* at 79a & n.1).

[2] Though foreign-born individuals are required to learn English before they may become naturalized citizens (see 8 U.S.C. 1423(1)), the federal law then in effect nevertheless required these particular counties to make available "voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" (42 U.S.C. 1973aa-1a(c)), in Spanish as well as in English (App., *infra,* 3a). The County of San Francisco had to make the materials available in Chinese as well (*ibid.*).

they interview any registrant who had not positively been identified as a United States citizen (*id.* at 5a, 80a). The local district attorneys did so, either by letter or by non-custodial contact (*id.* at 80a-81a). After reviewing the results of these interviews, Russoniello closed his investigation and elected not to pursue any criminal prosecutions (*id.* at 7a-8a, 27a, 44a).

2. On May 12, 1982, however, before Russoniello determined to terminate his inquiry, respondents filed this class action against the principal federal and state officials involved in the voting registration fraud investigation (App., *infra,* 5a). Respondents are (1) a Hispanic-American citizen who was randomly selected for investigation and (2) certain organizations that promote the voting rights of Hispanic and Chinese Americans in the San Francisco Bay area (*ibid.*). Respondents alleged that the investigation "interfered with their statutorily protected right to participate in the electoral process[,] discriminated against them on the basis of race and national origin[,] and deterred the exercise of their First Amendment right to freedom of association" (*id.* at 81a). They prayed that the district court award them injunctive, declaratory, and monetary relief (*id.* at 42a).

On the government's motion, the district court on May 24, 1982 dismissed respondents' prayer for injunctive relief, finding "that, as a matter of law, it ha[d] no jurisdiction to enjoin or otherwise control a preliminary investigation of the U.S. Attorney's office" (App., *infra,* 96a). Then, in ruling on the parties' cross-motions for summary judgment, the court on December 15, 1982 dismissed the remainder of respondents' suit (*id.* at 81a). In an opinion filed later, the court found that "[t]here is nothing in the record to indicate that the[] interviews rose to the level of an involuntary interrogation nor is there any evidence as to any individual being penalized in any way for refusing to cooperate" (*id.* at 80a-81a), that "all of the

information provided by the local defendants and the INS is a matter of public record" (*id.* at 84a), and that, "[f]aced with evidence indicating the possibility of such a substantial impact on the integrity of the franchise, the United States Attorney ha[d] the right, if not the duty, to at least determine the scope of the actual problem and, if necessary, [to] instigate required remedial action" (*id.* at 85a). Thus, the court determined that the "defendants' actions did not violate any clearly established right held by either the individual or group plaintiffs to participate in the electoral process" (*id.* at 88a) and that all defendants, including both petitioners, were entitled to qualified immunity and summary judgment (*id.* at 95a).

3. A divided panel of the Ninth Circuit affirmed (App., *infra,* 41a-75a). After determining that the cessation of the investigation did not render the controversy moot (*id.* at 44a-47a), the court held that, while both the individual and organizational respondents had standing to seek monetary relief, only the organizational respondents had standing to seek equitable relief (*id.* at 47a-54a). As to the individual respondent, the court found that his allegation that the investigation had a "chilling effect" on him did not present a "justiciable claim" (*id.* at 49a), and that any "stigma" he suffered from "public disclosure that the investigation was taking place * * * was self-induced" (*id.* at 50a). As to the organizational respondents, the court found that "their voter registration and educational efforts ha[ve] been hindered as the direct result of the challenged investigation" (*id.* at 51a), that "they are undoubtably the targets of Russoniello's investigation and may be charged with improperly influencing ineligible persons to register" (*id.* at 52a), and, accordingly, that they "raise[d] sufficient claims of potential direct injury to both themselves and their members" to have standing to challenge the investigation (*id.* at 53a).

Nevertheless, the court held that none of the respondents were not entitled to any of the relief being sought (App., *infra,* 54a-69a). The court determined that, while "[t]he district court erred in its ruling that it lacked jurisdiction" to enjoin or otherwise control Russoniello's investigation (*id.* at 54a), "intrusions into the investigative process of a United States Attorney present 'difficult problems of separation of powers' " (*id.* at 55a, quoting *Jett* v. *Casteneda,* 578 F.2d 842, 845 (9th Cir. 1978)), and therefore that "only in extraordinary circumstances [sh]ould [a court] entertain an action to enjoin a prosecutor's investigatory activities" (App., *infra,* 55a). The court found "no [such] extraordinary circumstances * * * suggested" in the summary judgment record of this case (*ibid.*), noting that "a United States Attorney is entitled, indeed required, to conduct an investigation into allegations of voting fraud" (*id.* at 61a), and that the investigation in this case was "reasonably limited in both its scope and its use of classifications" (*ibid.*). On that premise, the court then determined that "the district court's denial of [injunctive and] declaratory relief was not an abuse of discretion" (*id.* at 64a), reasoning that respondents sought "a declaration that the government's activities are unlawful" (*id.* at 63a), and that "the same concerns regarding interference with the activities of prosecuting officials" made both injunctive and declaratory relief improper (*id.* at 64a). Finally, the court determined that neither the individual nor the organizational respondents were entitled to monetary relief (*id.* at 66a-69a), finding that the investigation did "not violate any 'clearly established' rights" (*id.* at 69a) and that "all those sued were entitled at least to qualified, good faith immunity" (*id.* at 68a).[3]

---

[3] Judge Nelson dissented (App., *infra,* 69a-75a). While she agreed that "the organizations ha[d] standing" and that the "defendants [were] entitled to good faith immunity from damages" (*id.* at 69a), Judge Nelson disagreed "that [the individual respondent] lack[ed]

4. On petition for rehearing, the court vacated the panel decision and, by a six to five vote, reversed and remanded the case to the district court (App., *infra,* 1a-38a). Like the panel, the en banc majority found that respondents were not entitled to monetary relief (*id.* at 23a-24a), reasoning that respondents' suit "raise[d] issues of first impression" (*id.* at 24a) and that "the government officials did not violate [any] 'clearly established' rights" by the conduct of their investigation (*ibid.*). Moreover, like the panel, the en banc majority determined that the organizational respondents had standing to seek equitable relief (*id.* at 12a-15a), finding that the organizations "are undoubtably the targets of Russoniello's investigation and could be charged with improperly influencing ineligible persons to register" (*id.* at 14a), that "the investigation directly undermined the Organizations' voter education and registration efforts" (*ibid.*), and that "the Organiza-

---

standing," "that 'extraordinary circumstances' are required to enjoin an investigation that infringe[d] upon First Amendment rights * * *," or "that declaratory and injunctive relief should be judged under the same standards" (*id.* at 69a-70a). Judge Nelson argued that the individual respondent had standing because "[t]he burden which [he] allege[d] upon his exercise of the franchise—that his request for a bilingual ballot triggered an investigation of him by the INS, the FBI, and the United States Attorney, and an interview with the local District Attorney at which he was to prove his citizenship—[was] concrete" (*id.* at 71a), and because "the majority's suggestion that any stigma * * * was [the individual respondent's] own fault * * * ha[d] neither legal support nor a factual basis in the record" (*id.* at 70a-71a). She then argued that a district court always has equitable authority to enjoin an investigation that lacks a "reasonable basis" (*id.* at 71a-72a), and to issue declaratory relief concerning any unconstitutional action by a government official (*id.* at 72a-73a). Accordingly, Judge Nelson would have remanded the case with instructions that the district court enjoin the investigation "if it lacked a reasonable basis or was initiated in bad faith" (*id.* at 71a) and, in any event, that the district court declare "[t]he investigation * * * unconstitutional under the Equal Protection Clause" (*id.* at 75a).

tions' voter education and registration efforts are unquestionably protected from unwarranted interference by prosecutorial officials" (*ibid.*). Unlike the panel, however, the en banc majority found that the individual respondent had standing to seek equitable as well as monetary relief (*id.* at 11a-12a), reasoning that the individual respondent "was stigmatized as a person who might have registered to vote illegally" (*id.* at 11a) and that "the Government required [him] to prove his citizenship, an affirmative obligation the Government did not place on people who requested English language ballots" (*id.* at 12a).

The en banc majority then turned to respondents' prayers for relief and held that "the district court [had] erred in dismissing the injunctive claims" (App., *infra,* 15a) and in "appl[ying] the good faith immunity standard * * * to * * * bar[] [all] equitable relief" (*id.* at 16a n.8). Without acknowledging that separation of powers places any constraints on the injunctive authority of the federal courts, the en banc majority determined that the district court had jurisdiction to enjoin the investigation and that the case should be remanded so that the district court could determine whether such an injunction should issue (*id.* at 15a). Similarly, without discussing whether the separation of powers places any restrictions on the declaratory authority of the federal courts, the en banc majority examined the merits of respondents' substantive claims and declared that "the voter registration fraud investigation directed toward foreign-born, recently registered voters, requesting bilingual ballots involve[d] a suspect classification" (*id.* at 19a), burdened respondents' "fundamental right" to vote (*id.* at 20a), and "interfered with their constitutional right of association and political expression" (*id.* at 22a).[4] The court then remanded the

---

[4] At the same time, the court determined that "[t]here [was] * * * no evidence that by investigating the individual appellants, the Government intended to deny or abridge their right to vote" (App., *infra,*

case with instructions that the district court conduct a trial concerning whether the investigation was conducted by the least "drastic" means available (*id.* at 19a), whether respondents' right to vote was unduly burdened (*id.* at 20a), and whether respondents' First Amendment interests outweighed the government's interest in preventing voter registration fraud (*id.* at 23a).

Judge Wallace, joined by Judges Sneed, Alarcon, and Beezer, dissented (App., *infra,* 25a-36a).[5] Judge Wallace first argued that the individual respondent did not have standing to seek equitable relief, because "[t]here is little reason to believe that the government will again investigate [him] as a possible noncitizen voter" (*id.* at 29a), and because "the investigation in this case involved purely voluntary, noncoercive interviews—with no threat of federal prosecution" (*ibid.*). He then argued that "[t]he majority neglect[ed] to respect the special limitations on our power to enjoin criminal investigations by the executive branch * * *" (*ibid.*). While Judge Wallace agreed with the majority that "separation of powers principle[s] may not mandate judicial inaction where the executive outrageously oversteps limitations on prosecutorial power" (*id.* at 30a), he found "nothing egregious about the prosecutorial conduct in this case" (*id.* at 31a). In particular, he noted that the United States Attorney had focused his investigation on recently-registered, foreign born voters requesting bilingual ballots only "to narrow his inquiries to those persons who may have [had] knowledge of serious criminal activity" (*id.* at 33a); that "considerations of national origin or race are relevant in

---

21a). Accordingly, it held that "the district court did not err in granting summary judgment on the Voting Rights Act claims" (*id.* at 22a).

[5] Judge Hug also dissented (App., *infra,* 36a-37a). Because the investigation had ended, he would have dismissed the claims for injunctive and declaratory relief as moot (*id.* at 37a).

many prosecutorial investigations conducted by the executive branch" (*id.* at 35a); that any burden created by the investigation was "a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct" (*id.* at 36a); and that neither the review of public records nor the follow-up questioning of potential witnesses "involve[d] any violation of first amendment rights" (*ibid.*). Accordingly, Judge Wallace concluded that the "requirements for equitable relief against a prosecutorial investigation cannot be met on the facts alleged in this case" (*id.* at 31a).[6]

REASONS FOR GRANTING THE PETITION

This case presents questions of profound importance concerning the relationship between the Executive and Judicial Branches. First, it raises the issue whether a federal court has authority under Article III of the Constitution to consider a pre-indictment challenge to the manner and scope of noncoercive, criminal investigative activities by a United States Attorney. If the Court should conclude that some such authority exists, the case raises a second issue concerning the circumstances in which a federal court may exercise that authority and whether those circumstances exist in this case. Because of the recurrent nature of those issues and their critical significance to

---

[6] Judge Sneed added a separate word "to underscore Judge Wallace's dissent" (App., *infra,* 37a-38a). Judge Sneed emphasized that the fact "[t]hat Hispanics and Chinese make up th[e] pool [Russoniello investigated is] the consequence of geography, history, and the Voting Rights Act, not the discriminatory bias that the majority ascribes to the fact" (*id.* at 38a). Judge Sneed found that "[t]he classification employed by the United States Attorney was crafted to discover fraudulent voting. It was 'for all practical purposes' nothing more" (*ibid.*).

both general principles of separation of powers and the effective operation of the federal criminal justice system, this Court's review is warranted.

1. In our view, the district court was without authority to adjudicate either respondents' equitable or monetary prayers for relief in this case, because none of the challenged acts involved the sort of mature, coercive governmental action that is subject to judicial review under this Court's decisions. Rather, those prayers asked the district court to review a United States Attorney's initiation and conduct of a criminal investigation by wholly noncoercive means, actions which are nonjusticiable under Article III of the Constitution.

a. Article III of the Constitution does not grant the federal courts "an unconditioned authority to determine the constitutionality of legislative or executive acts" (*Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982)). Rather, Article III limits the "judicial power" of the United States to the resolution of "cases" and "controversies." U.S. Const. Art. III, § 2. "The 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded" (*Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). It thus acknowledges that certain questions about government are committed to the other Branches (see *Powell* v. *McCormack*, 395 U.S. 486, 516-549 (1969)) and thereby states "fundamental limits on [the] federal judicial power in our system of government" (*Allen* v. *Wright*, 468 U.S. at 750).

As an incident to the elaboration of this bedrock requirement for judicial review, litigants must show that the matters they seek to have adjudicated by the federal courts are judicially cognizable. The doctrines of " 'standing[,] * * * mootness, ripeness, political question, and the like—relate in part, and in different though overlapping

ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government' " (*Allen* v. *Wright,* 468 U.S. at 750, quoting *Vander Jagt* v. *O'Neill,* 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983) (Bork, J., concurring)). This Court has held, for example, that litigants may not invoke the authority of a federal court unless they have suffered a "judicially cognizable injury." See *Allen* v. *Wright,* 468 U.S. at 752, 753-756; *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 619 (1973). Likewise, it has held "that an essential prerequisite to [the] assertion [of a constitutional right] is a final and authoritative" governmental action; "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes" (*McDonald, Sommer & Frates* v. *County of Yolo,* No. 84-2015 (June 25, 1986), slip op. 7). And the Court has concluded that certain questions—so-called "political questions"—may not be adjudicated by federal courts at all; they simply "lie[] beyond judicial cognizance" (*Baker* v. *Carr,* 369 U.S. 186, 217 (1962)). See *Coleman* v. *Miller,* 307 U.S. 433 (1939); *Oetjen* v. *Central Leather Co.,* 246 U.S. 297 (1918). By such doctrines, federal courts are "confine[d] * * * to a role consistent with a system of separated powers and [to disputes] which are traditionally thought to be capable of resolution through the judicial process" (*Flast* v. *Cohen,* 392 U.S. 83, 97 (1968)). See generally *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.,* 454 U.S. at 472-473; *Baker* v. *Carr,* 369 U.S. at 217-226.

These limitations on judicial power have substantial bearing on the relationship between the Judicial and Executive branches in the exercise of the prosecutorial function. Article II of the Constitution vests the Executive Branch with the exclusive authority to "take Care that the

Laws be faithfully executed." See U.S. Const. Art. II, § 3. This delegation includes the function of the criminal prosecutor and, while much of what the prosecutor does may ultimately be challenged in the course of any proceeding that he initiates, his decisions whether, when, and what sort of cases to initiate accordingly have not been subject to review prior to the bringing of charges. See *United States* v. *Batchelder,* 442 U.S. 114, 124 (1979) ("whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion"); *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978) (assuming probable cause, decision whether and what to charge "rests entirely in [the prosecutor's] discretion"); *United States* v. *Nixon,* 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive and absolute discretion to decide whether to prosecute a case"); *United States* v. *Thompson,* 251 U.S. 407 (1920) (court order quashing indictment for failure to obtain permission of court to resubmit to grand jury invades functions of the United States Attorney and the grand jury); *Confiscation Cases,* 74 U.S. (7 Wall.) 454, 457 (1868) ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive discretion of the district attorney").

The "decision to prosecute is particularly ill-suited for judicial review"; "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake" (*Wayte* v. *United States,* 470 U.S. 598, 607 (1985)). See also *Heckler* v. *Chaney,* 470 U.S. 821, 831-832 (1985) ("the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement"); *Newman* v. *United States,* 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to

judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought"). For these reasons, the courts have found that private citizens ordinarily lack a judicially cognizable interest in the process employed and decisions reached by the Executive Branch concerning the filing of criminal charges. See *Leeke* v. *Timmerman,* 454 U.S. 83, 86-87 (1981); *Linda R.S.* v. *Richard D.,* 410 U.S. at 619.

b. To be sure, once a prosecution is initiated, it is subject to challenge in the ensuing criminal proceeding on a variety of grounds, including the motivations of the prosecutor in bringing it. See *Wayte* v. *United States,* 470 U.S. at 608; *Bordenkircher* v. *Hayes,* 434 U.S. at 364; *Blackledge* v. *Perry,* 417 U.S. 21, 28 (1974). And, even during the investigative phase, certain exercises of governmental power which are "regulatory, proscriptive, or compulsory in nature" may be challenged in court (*Laird* v. *Tatum,* 408 U.S. 1, 11 (1972)). Article III does not, for example, prevent a federal court from reviewing claims that an unreasonable "search" or "seizure" of persons or things has occurred (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971)), or that subpoenaed material should not be produced (see *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 208 (1946); cf. *Branzburg* v. *Hayes,* 408 U.S. 665, 707-708 (1972) (prosecutor may not use grand jury and its subpoena powers as instrument of oppression)). What may not be challenged, though, are the noncoercive information-gathering and deliberative aspects of the investigative process, up to and including the decision to seek a formal charge. In analogous contexts, this Court has made this point explicit.

In *Laird* v. *Tatum,* 408 U.S. 1 (1972), the Court identified the question presented as "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose" (408 U.S. at 10). The Court answered that question in the negative, reasoning that the Department of Army's investigative and data-gathering activities in that case were not "regulatory, proscriptive, or compulsory in nature" (*id.* at 11), and that private citizens are not entitled " 'to invoke the judicial power to determine the validity of executive * * * action' " in such circumstances (*id.* at 13, quoting *Ex parte Levitt,* 302 U.S. 633, 634 (1937)).

Similarly, in *FTC* v. *Standard Oil Co.,* 449 U.S. 232 (1980), a case arising under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701 *et seq.*, the Court held that the Federal Trade Commission's issuance of a complaint that it had "reason to believe" that several major oil companies were violating Section 5 of the Federal Trade Commission Act was not "final agency action" subject to judicial review. The Court reasoned that "the Commission's averment of 'reason to believe' * * * [was] not a definitive statement of position" (449 U.S. at 241), but rather "a threshold determination that further inquiry is warranted" (*ibid.*), and that, since this determination has no "legal or practical effect" except to impose a "burden of responding to the charges made against it" (*id.* at 242), judicial review would be premature, an "interference with the proper functioning of the agency and a burden for the courts" (*ibid.*). See also *McDonald, Sommer & Frates* v. *County of Yolo,* slip op. 7-12.

The Court's requirement in these cases of mature, coercive governmental action as a prerequisite to judicial review ultimately devolves from the separation of powers principles that underlie the "case or controversy" requirement in Article III. When the Executive Branch "does not exercise its *coercive* power over an individual's liberty or property rights," it "does not infringe upon areas that courts often are called upon to protect" (*Heckler* v. *Chaney*, 470 U.S. at 832) (emphasis in original). Thus, judicial review of such Executive Branch activities "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird* v. *Tatum*, 408 U.S. at 15). The constitutional separation of powers precludes courts from assuming this role. See *Allen* v. *Wright*, 468 U.S. at 760, quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983) (" '[a] federal court * * * is not the proper forum to press' general complaints about the way in which government goes about its business"); *Nathan* v. *Smith*, 737 F.2d 1069, 1077 (D.C. Cir. 1984) (Bork, J., concurring) (any attempt by the courts to "control the law enforcement decisions of the Attorney General * * * would raise serious constitutional questions relating to the separation of powers"); *Reporters Committee for the Freedom of the Press* v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979) ("[t]he balance between the Executive and Judicial branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive Branch * * *"); *LaRouche* v. *Webster*, 566 F. Supp. 415, 418 (S.D.N.Y. 1983) ("it is not the function of the courts to review the wisdom of the prosecutor's decision to investigate, or to inquire into the prosecutor's motives"); see also *Jett* v. *Casteneda*, 578 F.2d 842, 845 (9th Cir. 1978).[7]

---

[7] The Court has similarly held that the federal courts may not "saddle a grand jury with minitrials and preliminary showings" concerning

its investigation of possible criminal activity (*United States* v. *Dionisio*, 410 U.S. 1, 17 (1973)). The Constitution vests the grand jury with responsibility for determining "whether there is probable cause to believe a crime has been committed and [for] * * * protect[ing] * * * citizens against unfounded criminal prosecutions" (*United States* v. *Calandra*, 414 U.S. 338, 343 (1974)). To allow it to fulfill that function, the grand jury has "wide latitude to inquire into violations of criminal law" and to "determine alone the course of its inquiry" (*id.* at 343). Grand jurors "may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge" (*United States* v. *Dionisio*, 410 U.S. at 15), and "[a] sufficient basis for an indictment may only emerge at the end of the investigation when all the evidence has been received" (*id.* at 15-16). See also *Costello* v. *United States*, 350 U.S. 359, 362 (1956). Therefore, this Court has held that private citizens generally may not object to the competency, relevancy, or constitutionality of the evidence that a grand jury considers (see *id.* at 344-345, 353-355), challenge the basis on which a grand jury has initiated an investigation (see *United States* v. *Dionisio*, 410 U.S. at 13-17), or "set limits to the investigation that the grand jury may conduct" (*Blair* v. *United States*, 250 U.S. 273, 282 (1919)). The Court has held that private citizens may challenge only the coercive aspects of a grand jury's investigation (as that coercion applies to the persons affected). See *United States* v. *Dionisio*, 410 U.S. at 11-12, 16-18; *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906); see also *Branzburg* v. *Hayes*, 408 U.S. at 707-708.

Importantly, " '[t]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury' " (*Butz* v. *Economou*, 438 U.S. 478, 510 (1978), quoting *Yaselli* v. *Goff*, 12 F.2d 396, 404 (2d Cir. 1926) (citation omitted)). Like the grand jury, the prosecutor does not and cannot make decisions to prosecute "in a vacuum" (*Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981)); rather, like the grand jury, the prosecutor ordinarily must conduct a preliminary investigation to determine whether charges should be filed. See *United States* v. *Goodwin*, 457 U.S. 368, 382 n.14 (1982); *Cook* v. *Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980). Indeed, though "the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witnesses it requires" (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983)). In obtaining this material for the grand jury, the prosecutor does not conduct "an

BEST

c. In this case, it is quite clear that neither Russoniello nor any of the other government officials involved in the investigation subjected respondents to any coercive investigatory or prosecutorial action. They did not seek a warrant or otherwise conduct any search or seizure of respondents' persons or premises, compel respondents to provide information by subpoena or custodial interrogation, or file any indictments or criminal charges.[8] Rather, Russoniello requested that the voter registrars of the nine counties randomly select from public records and submit to him the names of 25 recently-registered foreign born voters who had requested bilingual ballots; INS then verified the citizenship status of the names submitted to Russoniello; and, on receiving INS's report from Russoniello, the district attorneys conducted noncustodial interviews of any individuals whom INS was unable positively to identify as citizens. As the district court noted, "all of the information provided by the local defendants and INS [was] a matter of public record" (App., *infra*, 84a); "[t]here is nothing in the record to indicate

---

"an adversary hearing in which the guilt or innocence of the accused is adjudicated" (*United States* v. *Calandra*, 414 U.S. at 343). Rather, like the grand jury, the prosecutor conducts "an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person" (*id.* at 343-344). Thus, in the absence of coercive activity, the prosecutor also "must be free to pursue [his] investigation unhindered by external influence or supervision * * *" (*United States* v. *Dionisio*, 410 U.S. at 17).

[8] Russoniello did suggest in his letter to the district attorneys that he would seriously "consider" prosecuting any group or individual who had deliberately conspired to register unqualified voters. See App., *infra*, 43a. But Russoniello made this suggestion without knowing the identities of respondents (or the identities of any other person whom he could prosecute). Thus, he did nothing more than make an impersonal statement that, if he discovered that federal law was being violated, he would enforce the federal law.

AVAILABLE COPY

that the[] interviews rose to the level of an involuntary interrogation" (*id.* at 80a-81a); "nor is there any evidence as to any individual being penalized in any way for refusing to cooperate" (*id.* at 81a). In short, there is no basis for suggesting that any aspect of this investigation was coercive or that government officials were doing anything other than conducting a preliminary inquiry concerning whether a fuller grand jury investigation or criminal prosecution might be warranted. Accordingly, the district court should have been held without authority to review the manner and scope of these government officials' investigative actions.

d. Respondents' allegation of "chilling effect" resulting from the investigation does not render their claims justiciable. See *Laird* v. *Tatum*, 408 U.S. at 13-15. Nor does their allegation of "stigma" make those claims judicially cognizable. See *Allen* v. *Wright*, 468 U.S. at 753-756. Rather, just as "the expense and annoyance of litigation is 'part of the social burden of living under government' " (*Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938) (citation omitted)), so too is the expense and annoyance of being identified as a witness or suspect in connection with possible criminal activity a price of living in a society committed to law enforcement. See *FTC* v. *Standard Oil Co.*, 449 U.S. at 244; *Laird* v. *Tatum*, 408 U.S. at 11-15; *Younger* v. *Harris*, 401 U.S. 37, 46-47 (1971); *Jones* v. *Unknown Agents of the Federal Election Comm'n*, 613 F.2d 864, 877-878 (D.C. Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *LaRouche* v. *Webster*, 566 F. Supp. 415, 418 (S.D.N.Y. 1983). In the absence of governmental action that is "regulatory, proscriptive, or compulsory in nature," allegations of "chill" and "stigma" are simply inadequate to make governmental action judicially reviewable.

The court of appeals' contrary judgment spells great mischief for the orderly administration of law by both the Executive and Judicial Branches. Authorizing federal courts to review the noncoercive aspects of criminal investigations will allow resourceful and obstreperous litigants to divert the courts' and the prosecutors' "energy and attention * * * from the pressing duty of enforcing the criminal law" (*Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976)). Moreover, anticipatory judicial intervention into the investigatory process will deny prosecutors an opportunity to correct their own mistakes and lead to piecemeal review (*FTC* v. *Standard Oil Co.*, 449 U.S. at 243), "delay[] the criminal proceeding, threaten[] to chill law enforcement by subjecting the prosecutor[s'] motives and decisionmaking to outside inquiry, and * * * undermine prosecutorial effectiveness by revealing the Government's enforcement policy" (*Wayte* v. *United States*, 470 U.S. at 607). Indeed, allowing such challenges will create an incentive for prosecutors to forgo particular investigations and certain sources of evidence, to resort to the grand jury to investigate possible criminal activity (rather than use the less intrusive means available to prosecutors' offices), and, if necessary, to pursue prosecutions without having fully investigated all circumstances surrounding a case. See generally *Butz* v. *Economou*, 438 U.S. 478, 509-517 (1978); *United States* v. *Lovasco*, 431 U.S. 783, 792-796 (1977); *Imbler* v. *Pachtman*, 424 U.S. at 424-431. This Court's immediate intervention is necessary to preserve "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" (*id.* at 427-428).

2. While we submit that there can be no occasion justifying pre-indictment judicial review of investigative activities by a United States Attorney that are not "regulatory, proscriptive, or compulsory in nature," should the Court disagree on that point, there remains a

substantial question concerning whether such review was justified in the circumstances presented here. The court of appeals held that, although the government officials had a legitimate investigatory purpose and did not violate any clearly established rights, a remand was necessary so that the district court could (1) reassess whether injunctive relief should issue and (2) hold a trial concerning whether Russoniello's investigation was conducted by the least restrictive means available, whether the investigation unduly burdened respondents' fundamental right to vote, and whether the government's interest in preventing voter registration fraud outweighed respondents' First Amendment rights. This holding grossly departs from settled principles of equity jurisprudence and constitutes an unwarranted and unprecedented interference with the prosecutorial activities of the Executive Branch.

a. The Constitution's clear delegation of authority to the Executive Branch to conduct investigations and to present criminal charges is complemented by the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" (*Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971)). This doctrine "prevent[s] erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted" (*id.* at 44). Thus, this Court has long held that "in the absence of exceptional circumstances creating a threat of irreparable injury 'both great and immediate,' a federal court must not intervene by way of either injunction or declaratory judgment" in an ongoing state criminal prosecution (*Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975)). See also *Perez* v. *Ledesma*, 401 U.S. 82, 85 (1971) (equitable relief against state prosecutions is

available "[o]nly in cases of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances").

While this limitation on the equity power has been repeatedly articulated in cases dealing with the authority of federal courts to intervene in pending state criminal cases (see, *e.g.*, *Trainor* v. *Hernandez*, 431 U.S. 434, 446-447 (1977); *Kugler* v. *Helfant*, 421 U.S. at 123-125; *Younger* v. *Harris*, 401 U.S. at 43-44; *Dombrowski* v. *Pfister*, 380 U.S. 479, 482 (1965)), or to oversee state law enforcement practices (see, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983); *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976)), no lesser restriction on judicial power can apply where noncoercive federal criminal investigative activities are concerned. Such governmental activities are almost always less directly intrusive on the interests of those on whom the investigation touches than is a pending prosecution where charges have been filed. Moreover, the separation of powers concern to protect the United States Attorney's investigative authority, like the federalism concern at work in *Younger* and *Lyons*,[9] imposes an additional limiting factor on the equitable discretion of the federal courts. See *Allen* v. *Wright*, 468 U.S. at 760, quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974)

---

[9] The Court has held that federal court interference with state criminal prosecutions is generally inconsistent with notions of "comity" and "our Federalism" (*Younger* v. *Harris*, 401 U.S. at 44). In so holding, however, the Court has made clear that principles of comity and federalism only "reinforce[]" the "underlying reason" for judicial restraint, to wit, the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" (*id.* at 43, 44).

("[c]ase or controversy considerations * * * 'obviously shade into those determining whether the complaint states a sound basis for equitable relief' ").

For these reasons, with the exception of the court below, the lower federal courts have uniformly accorded federal criminal investigations no less protection from judicial scrutiny than *Younger* accorded state criminal prosecutions. Those courts have thus held that such investigative activities may be enjoined or declared unconstitutional only in the most extraordinary circumstances. See, *e.g., Reporters Committee for Freedom of the Press* v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978); *Jett* v. *Casteneda*, 578 F.2d 842, 845 (9th Cir. 1978); *LaRouche* v. *Webster*, 566 F. Supp. 415, 417 (S.D.N.Y. 1983); see also *In re Grand Jury of the Southern District*, 508 F. Supp. 1210, 1214 (S.D. Ala. 1980); *Pollard* v. *Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), aff'd, 393 U.S. 14 (1968); *In re Grand Jury Subpoena to Central States*, 225 F. Supp. 923, 925 (N.D. Ill. 1964).

b. Assuming that the sort of "extraordinary circumstances" required by the *Younger* line of cases will justify equitable intervention in federal criminal investigations by United States Attorneys, it is nevertheless clear that no such extraordinary circumstances exist here. Respondents simply have not alleged or proved either the "great and immediate" irreparable injury or the "bad faith," "proven harassment," or flagrant and patent violation of express constitutional prohibitions or other extreme circumstances that are prerequisite to anticipatory judicial intervention in even coercive prosecutorial activity. See *Younger* v. *Harris*, 401 U.S. at 46, 53, 54; see also *City of Los Angeles* v. *Lyons*, 461 U.S. at 112.

The alleged injuries in this case simply are not "great and immediate" within the meaning of the *Younger* line of cases. See *Younger* v. *Harris*, 401 U.S. at 46. As Judge

Wallace noted in the dissent (App., *infra*, 29a), "the result of the investigation was to demonstrate that [the individual respondent] is a citizen, legally registered to vote, [and] there is little reason to believe that the government will again investigate [him] as a possible noncitizen voter." Thus, the individual respondent has no basis at all for seeking prospective relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-106, 111; *O'Shea* v. *Littleton*, 414 U.S. at 499-504. We likewise doubt that the injuries alleged by the organizations are sufficient to provide them with standing, since they allege "chilling effects" from an investigation that never specifically focused on them or subjected them to a reasonable threat of prosecution. See *Laird* v. *Tatum*, 408 U.S. at 13-14; *Boyle* v. *Landry*, 401 U.S. 77, 80-81 (1971). But even if these "chilling effects" are sufficient to provide the organizations with standing, they are not " 'irreparable' in the special legal sense of that term" (*Younger* v. *Harris*, 401 U.S. at 46). Rather, such "chilling effects" are reparable by the termination of the investigation (as in this case), or by the successful defense of any prosecution that results. See *FTC* v. *Standard Oil Co.*, 449 U.S. at 244-245; *Younger* v. *Harris*, 401 U.S. at 46-47.

Moreover, the governmental action challenged in this case was not conducted in bad faith, for the purpose of harassing respondents, or in flagrant disregard of respondents' rights. The undisputed facts show that Russoniello learned through public sources of allegations that various persons or organizations may have been conspiring fraudulently to register unqualified voters. It was certainly proper and perhaps obligatory that he institute some further inquiry. In doing so and in attempting to enforce the law against registration of noncitizens, Russoniello naturally focused on registrants' foreign birth, recent registration and request for bilingual voting materials. These three pieces of information were readily available on the voter registration form and were an ob-

vious means of focusing the "investigation on persons who had registered at a time that illegal registrations may have been rampant and who, if they were witnesses to criminal activity, would be more likely to recollect details than would be long-registered noncitizen voters" (App., *infra*, 33a-34a). In short, Russoniello framed his investigation carefully to identify persons "who [might] have knowledge of serious criminal activity" (*id.* at 33a). Indeed, since Russoniello terminated the investigation when it failed to produce sufficient evidence to warrant a fuller grand jury investigation or criminal prosecution (*id.* at 45a), the record not only fails to establish prosecutorial misconduct for which there is "an extraordinarily pressing need for immediate federal equitable relief" (*Kugler* v. *Helfant*, 421 U.S. at 125), it shows that there is no continuing prosecutorial conduct at all.

That the investigation in some sense "targeted" persons of Chinese-American and Hispanic-American origin does not justify anticipatory judicial intervention. The Equal Protection Clause does not require prosecutors to turn a blind eye to basic descriptive facts relevant to suspected criminal conduct. This Court has therefore recognized that law enforcement officials may consider group characteristics and statistical profiles, including the national origin or race of suspects and witnesses, in narrowing their investigations. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975); *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986) (Stevens, J., dissenting), slip op. 2-4. Here, "recently-registered voters from the Chinese-American and Hispanic-American communities were most likely to be able to furnish [Russoniello] with valuable information for the criminal investigation of a pattern of illegal voter registration he had reason to believe was occurring in those communities" (*id.* at 34a-35a). Thus, it was entirely proper for Russoniello to seek information from and concerning them.

Even the opinion of the court below makes clear that the government officials involved in this investigation did not engage in the sort of bad faith, harassment, or other extreme behavior that arguably would establish the "extraordinary circumstances" necessary for enjoining a prosecutor's activities.[10] The court below found that "the government had a compelling interest in preventing voter registration fraud" (App., *infra*, 19a), that there was no evidence that the government intended to deny or abridge respondents' right to vote (*id.* at 21a), that respondents' suit "raise[d] issues of first impression" (*id.* at 24a), and that "the government officials did not violate [any] 'clearly established' rights" by the conduct of their investigation (*ibid.*). In short, the court conceded that Russoniello's investigation was not conducted for purposes of harassment, did not violate any clearly established rights, and had not been shown to be devoid of legitimate investigatory purpose. Accordingly, the court should have held that the requisite "extraordinary circumstances" were absent and that neither injunctive nor declaratory relief could issue in this case.

c. The contrary conclusion of the court below has unfortunate and far-reaching implications for the future relationship between federal prosecutors and the courts. Without any discussion of separation of powers con-

[10] As noted above, this Court has held that the "extraordinary circumstances" standard applies to prayers for declaratory as well as for injunctive relief. See *Kugler* v. *Helfant*, 421 U.S. at 123-124; *Samuels* v. *Mackell*, 401 U.S. 66, 72 (1971). See also *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975). Thus, while it is true that there are some cases in which declaratory but not injunctive relief may be granted (see *Steffel* v. *Thompson*, 415 U.S. 452, 466-473 (1974)), this clearly is not such a case. As Judge Wallace noted in his original panel opinion, respondents are not "seeking a declaration that * * * [their] voter registration activities are lawful. Rather, they seek a declaration that the government's activities are unlawful. * * * In these circumstances, * * * [d]eclaratory relief * * * would raise the same concerns regarding interference with the activities of prosecuting officials [as the issuance of injunctive relief would raise]" (App., *infra*, 63a-64a).

straints, the court has remanded with instructions that the district court reassess whether injunctive relief should issue and, in any event, hold a trial concerning whether Russoniello's investigation was conducted by the least restrictive means available, whether the investigation unduly burdened respondents' fundamental right to vote, and whether the government's interest in preventing voter registration fraud outweighed respondents' First Amendment interests. As noted earlier, this judgement invites litigants to use the courts to disrupt ongoing criminal investigations, precludes federal prosecutors from successfully defending even insubstantial claims (like those involved in this case) by motions for summary judgment, threatens to chill legitimate prosecutorial activity, and places the federal courts in the position of supervising activities that the Constitution places in the exclusive discretion of the Executive Branch. This Court's review is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General

MICHAEL JAY SINGER
JAY S. BYBEE
Attorneys

JANUARY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 82-4427, 83-2581

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS-APPELLEES.

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS, CHINESE FOR AFFIRMATIVE ACTION, AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; O'MALLEY, WILLIAM A., INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY: UNDERWOOD, LON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; SMITH, ARLO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY, ET AL., DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of California.

Argued and Submitted April 29, 1986

Decided Aug. 26, 1986

Before BROWNING, Chief Judge, and WALLACE, SNEED, HUG, TANG, SKOPIL, SCHROEDER, PREGERSON, ALARCON, FERGUSON, and BEEZER, Circuit Judges.

PREGERSON, Circuit Judge.

Jose Olagues and various organizations promoting the voting rights of Chinese Americans and Hispanic Americans in the San Francisco Bay area filed a class action suit against the United States Attorney for the Northern District of California and various other government officials for damages, and declaratory and injunctive relief. Olagues and the organizations allege that a voter registration fraud investigation conducted by the United States Attorney violated the Voting Rights Act and the first, fifth, fourteenth, and fifteen amendments to the United States Constitution.

The district court dismissed the injunctive claims on the ground that it lacked jurisdiction to enjoin an investigtion by a United States Attorney. Subsequently, the court granted summary judgment in favor of the United States Attorney and the other government officials on the remaining declaratory judgment and damage claims.

The appellants contend, *inter alia*, that the district court erred in dismissing their injunctive relief claim and in granting summary judgment for the government officials on the appellants' claims for damages and declaratory relief.

We affirm in part and reverse in part.

BACKGROUND

On April 19, 1982, three weeks before the voter registration deadline for the 1982 California primary election, the United States Attorney for the Northern District of

California, Joseph P. Russoniello, commenced an investigation of foreign-born voters who requested bilingual ballots in nine San Francisco Bay Area counties.[1] In all nine counties affected by the investigation, voting materials were available pursuant to federal law in both Spanish and English. *See* 42 U.S.C. § 1973aa-1a. In San Francisco County, they were also available in Chinese.

Russoniello sent a letter requesting the district attorneys of each of the nine counties to send him the names of twenty-five randomly selected recently registered, foreign-born voters who requested bilingual ballots so that the Immigration and Naturalization Service (INS) could verify the citizenship status of those individuals. The letter stated that further investigation would be undertaken of those not positively identified as United States citizens. In addition, the letter stated that although Russoniello did not intend to prosecute ineligible registered voters under federal law, country officials could prosecute them under the California Elections Code. Russoniello's letter also stated that he would seriously consider prosecuting any group or individual who fraudulently registered the ineligible voters.

The impetus for the secret investigation came from Russoniello's review of two reports prepared by Santa Clara County's District Attorney that summarized an investigation of foreign-born voters in Santa Clara County. The investigation focused on all foreign-born voters in the Fifth District of the City of San Jose and uncovered some cases where non-citizens had been registered to vote.

In stating his reasons for targeting only Spanish-speaking and Chinese-speaking foreign-born voters,

---

[1] The counties were Alameda, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, Contra Costa, and Sonoma.

Russoniello referred to voter registration drives recently undertaken to register those voters and the fact that the Spanish language voter registration materials did not accurately translate the requirement that a voter must be a citizen.[2] Russoniello believed that individuals who requested bilingual ballots were more susceptible to being confused or misled about voter eligibility. He was concerned that if there was widespread illegal registration, the upcoming elections would be subject to challenge.

All of the district attorneys and registrars of voters of the nine counties cooperated and sent the names Russoniello had requested. Olagues and others in the plaintiff class were among the persons investigated.[3]

When information concerning the investigation became public, a variety of individuals expressed concern that the timing of the investigation and its focus on particular racial groups would have an intimidating effect on their right to vote.[4] Despite these concerns Russoniello persisted in the investigation.

---

[2] No problems with Chinese voting materials were noted.

[3] As a naturalized citizen Olagues is required to read, write, and speak English. Despite his English literacy he chose to use a bilingual ballot because he was running for an office and wanted to see how his campaign statement was translated in Spanish.

Lilia Medina, a naturalized citizen, was also investigated. When the INS could not verify her citizenship status, Russoniello requested the FBI to have her prove she was a United States citizen.

Another citizen who was investigated was Maria Gloria Rodriguez. A United States citizen since 1967, she worked with the League of Women Voters and was a deputy registrar of voters.

[4] For example, March Fong Eu, Secretary of State for California, wrote to Russoniello expressing concern that the investigation might have a chilling effect on bilingual voter's right to vote and that to single out voters of Hispanic and Chinese heritage for this registration fraud investigation raised serious questions of law and policy.

On May 12, 1982, appellants Jose Olagues, the Hispanic Coalition for Human Rights, Chinese for Affirmative Action, and San Francisco Latino Voter Registration Education Project (the "Organizations") filed this class action on behalf of naturalized citizens who use Spanish or Chinese language voting materials. Their complaint alleges that United States Attorney Russoniello, the nine County District Attorneys, the nine County Registrars of Voters, and INS District Director David Ilchirt (collectively the "Government") violated their civil and constitutional rights under the Voting Rights Act, and the first, fifth, fourteenth, and fifteenth amendments to the United States Constitution.

The appellants first sought to enjoin the investigation. Their declarations filed with the district court not only indicated how the investigation would adversely affect Chinese-speaking and Spanish-speaking voters, but also disclosed that the registration rate had already declined markedly in what would ordinarily have been the most successful weeks of the voter registration drive. The district court dismissed the claim for injunctive relief, holding that it lacked subject matter jurisdiction. The appellant timely appealed.

On May 26, 1982, Russoniello again wrote to the district attorneys of the nine counties concerning the investigation. He asked them to interview 113 persons that the INS could not identify as citizens. The district attorneys complied with his request. The interviews were conducted in person and by mail. Individuals who did not have proof of citizenship were asked to disclose the name of the person or the organization who had registered them.

On September 24, 1982, the Government moved for summary judgment or, in the alternative, for dismissal of the appellant's complaint and on November 30, 1982, the appellants moved for partial summary judgment. The

district court granted the Government's motion for summary judgment on the declaratory relief claims, and Olagues and the Organizations timely appealed.

This is a consolidated appeal from two district court decisions. The first appeal, No. 82-4427, is from the district court's decision on May 24, 1982, dismissing that part of plaintiff's complaint seeking injunctive relief against federal defendants. The second appeal, No. 83-2581, is from the district court's judgment and final order on September 15, 1983, granting the Government's motion for summary judgment and denying the appellants' motion for partial summary judgment.

A divided panel of this court affirmed the district court. *Olagues v. Russoniello*, 770 F.2d 791, 806 (9th Cir.1985), *withdrawn for rehearing en banc*, Nos. 82-4427 & 83-2581, unpublished order (9th Cir. Jan. 21, 1986). We took this case *en banc* because it raises important voting rights and constitutional issues relating to foreign-born, recently registered voters who request bilingual ballots.

DISCUSSION

I. ARTICLE III JUSTICIABILITY

"Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.' " *Diamond v. Charles*, ____ U.S. ____, ____, 106 S.Ct. 1697, 1702, 90 L.Ed.2d 48 (1986). Before we can reach the merits of this appeal, there are two jurisdictional issues we must address. First, we must decide whether the case is moot because Russoniello has terminated the investigation. Then we must decide whether any of the appellants have standing to assert the claims at issue in this case.

A. *Mootness*

There is no question that a case or controversy remains with respect to the damage claim. However, because Russoniello terminated the investigation, we must deter-

mine whether there remains a live case or controversy with respect to the equitable relief claim.

By itself, past exposure to illegal conduct is insufficient to establish a present case or controversy necessary to support a claim for equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). Claims for declaratory and injunctive relief therefore become moot when the challenged activity ceases if subsequent events show that the activity "could not reasonably be expected to recur," *Chinese for Affirmative Action v. Leguennec,* 580 F.2d 1006, 1009 (9th Cir.1978), *cert. denied,* 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979), unless there is a possibility of "continuing, present adverse effects," *O'Shea* 414 U.S. at 496, 94 S.Ct. at 676; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 1664, 75 L.Ed.2d 675 (1983) (six-month moratorium does not make case moot because the moratorium is not permanent and intervening events have not irrevocably eradicated the effects of the alleged violation).

In the instant case, there is a possibility of continuing adverse effects. The Organizations argue that their efforts have been hobbled because of the fear engendered in Chinese-speaking and Spanish-speaking foreign-born citizens by the challenged investigation. The Organizations assert that the voter fraud investigation intimidated Chinese-speaking and Spanish-speaking citizens from registering to vote or requesting bilingual ballots because of fear that they would become targets of the investigation. These individuals are new to this country. Thus they are understandably insecure in exercising their recently acquired rights as citizens, and easily intimidated by government action.

The termination of Russoniello's investigation is not irrevocable. Therefore, unless we determine the legality of a voter fraud investigation that focuses on foreign-born

voters requesting bilingual ballots, the Organizations' registration drives may continue to suffer from the chilling effects of the investigation despite its termination.

Moreover, a live case or controversy for purposes of Article III may also remain even after the challenged activity ceases if the Government's actions are capable of repetition, yet evading review. *See, e.g., Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974); *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir.1985). The capable-of-repetition doctrine is limited to extraordinary cases where: (1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again. *Wiggins v. Rushen*, 760 F.2d 1009, 1011 (9th Cir.1985).

The first requirement is clearly met here. Voter registration investigations, such as the one conducted in the present case, may be of short duration, making them effectively capable of evading review by an appellate court. *See, e.g., Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47, 96 S.Ct.2791, 2796-97, 49 L.Ed.2d 683 (1976).

To satify the second requirement, the plaintiff must make a reasonable showing that he will again be subject to the challenged activity. *E.g., Lyons*, 461 U.S. at 109, 103 S.Ct. at 1669; *United States v. Max*, 779 F.2d 1415, 1416 (9th Cir.1986) (per curiam). Russoniello did not voluntarily cease the challenged activity because he felt that the investigation was in any way improper. Rather, he terminated the investigation solely because it failed to produce evidence supporting any further investigative efforts. Russoniello has at all times maintained that his actions were proper. A government official's voluntary cessation of the challenged activity is insufficient to render a case moot if "the legality of the challenged practices" is still disputed because "[t]he [official] is free to return to his old

ways." *W.T. Grant Co.*, 345 U.S. 629 at 632, 73 S.Ct. 894 at 897, 97 L.Ed. 1303; *see Allee v. Medrano*, 416 U.S. 802, 810-11, 94 S.Ct. 2191, 2197-98, 40 L.Ed.2d 566 (1974); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir.1982) (claim is moot if subsequent "events have completely and irrevocably eradicated the effects of the alleged violation").

Moreover, Russoniello continues to have available to him the necessary bilingual ballot lists to conduct a voter registration investigation similar to the one challenged here.[5] Because Russoniello is authorized to investigate election fraud and has the means to repeat a similar bilingual voter registration investigation, it is reasonable to believe that the appellants could be the targets of a similar investigation in the future. Thus, the same voting rights and constitutional issues are capable of repetition yet evading review.[6]

---

[5] The Government points out that the Director of the Census now has determined that these counties no longer must provide bilingual ballot materials, *see* 49 Fed.Reg. 25,887-88 (June 25, 1984). Nonetheless, the election officials in San Francisco, Santa Clara, Alameda and Monterey counties will continue to provide the same bilingual ballot materials as previously required by section 203(b) of the Voting Rights Act, 42 U.S.C. § 1973aa-1a(b). Therefore, the Government again will be able to target, for a voter registration fraud investigation, foreign-born Chinese-speaking and Spanish-speaking voters by obtaining the names of newly-registered citizens who request bilingual voting materials.

[6] This case is distinguishable from *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In *O'Shea*, the plaintiffs challenged certain arrest and bail procedures employed by state law enforcement and judicial officials. However, to be subject to these alleged unlawful procedures one must first have violated some law and then have been arrested. 414 U.S. at 496, 94 S.Ct. at 676. The Supreme Court found that the plaintiffs had failed to show any case or controversy because presumably they would obey

Furthermore, because this case raises important voting rights and constitutional issues, a strong public interest requires us to address the appropriateness of the Government's investigatory methods. The existence of a "public interest in having the legality of the practices settled . . . militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

In short, because there is a possibility of continuing adverse effects from the challenged governmental activities, and because the challenged activity is capable of repetition, yet evading review, and because of a strong public interest in having the legality of the challenged procedure determined, we conclude that a live case or controversy remains for purposes of granting equitable relief.

B. ***Standing***

[5] The Government contends that Olagues and the Organizations all lack standing to sue for equitable relief. "Standing is a threshold question in every case before a federal court." *McMichael v. County of Napa*, 709 F.2d 1268, 1269 (9th Cir. 1983). A party seeking to invoke the

---

the law, and therefore never would become subject to any unlawful procedures. *Id.* at 497, 94 S.Ct. at 676. Unlike the situation before us, the plaintiffs in *O'Shea* did not assert any constitutional right to act in the same manner as they had acted before their arrest. *See id.* at 498, 94 S.Ct. at 677.

In *Lyons*, the plaintiff challenged the use of chokeholds by Los Angeles police on arrestees. The Court applied *O'Shea* and held that there was no case or controversy for equitable relief because whether Lyons would be arrested and subjected to a chokehold a second time was purely speculative. *See* 461 U.S. at 105-06, 103 S.Ct. at 1666-67.

Here, Olagues and the organizations assert that the Government's actions have interfered with constitutionally protected activities. Moreover, unlike the plaintiffs in *O'Shea* and *Lyons*, neither Olagues nor the Organizations need to break any law to be subjected to the challenged governmental conduct.

court's authority must demonstrate that it personally has suffered some actual or threatened injury as a result of the alleged illegal conduct of the other party. *Diamond v. Charles*, ____ U.S. at ____, 106 S.Ct. at 1702.

1. *Olagues*

[6] In the circumstances of this case, Olagues would have standing to seek equitable relief under the Voting Rights Act if he has suffered an injury that has more than a generalized grievance.[7] *See Allen v. State Board of Elections*, 393 U.S. 544, 554-57, 89 S.Ct. 817, 825-27, 22 L.Ed.2d 1 (1969). He has alleged an injury. His request for a bilingual ballot triggered an investigation of his INS records by the FBI and INS and an interview by the local District Attorney. Therefore, he was stigmatized as a person who might have registered to vote illegally. This, at a time when he was running for political office himself.

The Government contends that Olagues's alleged injuries are insufficient to warrant injunctive relief. The

---

[7] Whether a plaintiff has standing under Article III involves constitutional and prudential limitations. *McMichael*, 709 F.2d at 1269-70 (citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979)). The constitutional limitations involve three components: (1) a threatened or actual "distinct and palpable" injury to the plaintiff; (2) a "fairly traceable causal connection" between that injury and the challenged conduct of the defendant; and (3) a "substantial likelihood" that the relief requested will redress or prevent the injury. *McMichael*, 709 F.2d at 1270. The prudential limitations require the plaintiff to:

> (1) assert the individual plaintiff's own rights;
> (2) have an injury that is more than a generalized grievance; and
> (3) have an interest arguably within the zone of interests protected or regulated by the statute or constitutional guarantee in question. *See id.* In this case, the only disputed factor is whether Olagues has an injury that is more than a generalized grievance.

Government categorizes the chilling effect injury as "subjective" and thus not justiciable under *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972).

In *Laird*, plaintiffs sought injunctive and declaratory relief against the Army's domestic surveillance system. *Id.* 408 U.S. at 2-8, 92 S.Ct. at 2320-23. The plaintiffs, however, were not targets of the surveillance, thus any chilling effect resulted merely from their knowledge of the surveillance activities. In this case, Olagues was in fact a target of Russoniello's investigation. Thus, the chilling effect stems from more than mere knowledge of a general investigation. Moreover, the Court in *Laird* recognizes that a plaintiff has standing when the government improperly imposes an affirmative obligation on him. *Id.* at 12, 92 S.Ct. at 2325. In this case, because he requested a bilingual ballot, the Government required Olagues to prove his citizenship, an affirmative obligation the Government did not place on people who request English language ballots. Therefore, we hold that Olagues has standing to sue for equitable relief.

2. *The Organizations*

Chinese for Affirmative Action is a voluntary membership group that seeks to protect the rights of Chinese-Americans. It monitors compliance with bilingual election requirements and encourages Asian-Americans to register and to vote. The Hispanic Coalition for Human Rights is an association of Hispanic organizations and persons of Mexican descent, with a goal of securing the civil rights of Hispanics. It encourages Hispanic Americans to register and to vote, and advises them on the availability of bilingual election materials. The San Francisco Latino Voter Registration Education Project is a coalition of Hispanic

groups that was conducting a voter education and registration drive at the time of the investigation.

An association-plaintiff has standing to seek redress of direct injury to the association itself. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976); *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975); *NAACP v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 335, 9 L.Ed.2d 405 (1963). Under certain circumstances, an association may also be entitled to seek redress for injury to its members. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *Simon,* 426 U.S. at 40, 96 S.Ct. at 1925; *Warth*, 422 U.S. at 511, 95 S.Ct. at 2211; *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972).

In *Hunt*, the Supreme Court established a three-part test to determine whether an association has standing: (1) either the group or its members must have suffered some direct, cognizable injury; (2) the interests the group seeks to protect must be germane to the organization's purpose; and (3) the claim or relief sought must not require the participation of the individual members in the suit. 432 U.S. at 343, 97 S.Ct. at 2441. A mere "abstract concern," *Simon*, 426 U.S. at 40, 96 S.Ct. at 1925, or "special interest" in a public issue, *Sierra Club*, 405 U.S. at 739, 92 S.Ct. at 1368, is legally insufficient to confer standing.

First, the Organizations contend that they have been injured in two ways. The investigators questioned foreign voters requesting bilingual ballots concerning who had assisted them in registering. The Organizations assert that the investigation has discouraged its members from participating in their associational activities, because they now fear that participation in the program to register voters will make them targets of a criminal investigation.

Therefore, the Organizations contends that the investigation cast a pall over their associational activities in violation of their first amendment rights. Moreover, while Russoniello stated that the federal government would not prosecute illegally registered voters, he raised the possibility that the state might prosecute them under state law. Thus, by discouraging their members from participating in the voter registration drives, and by discouraging citizens from registering to vote, the investigation directly undermined the Organizations' voter education and registration efforts.

The Organizations also assert that both they and their members are threatened with possible prosecution for violations of the Voting Rights Act. They contend that they are undoubtedly the targets of Russoniello's investigation and could be charged with improperly influencing ineligible persons to register.

We conclude that the Organizations' allegations raise sufficient claims of potential direct injury to both themselves and their members. In the case before us, the Organizations' voter education and registration efforts are unquestionably protected from unwarranted interference by prosecutorial officials; whether the investigation actually involved any unwarranted intrusions into their associational activities affects the merits of their claim, not their standing. Moreover, as stated above, members who participated in the Organizations' counseling activities and voter registration drives are potential targets of future prosecutions.

Second, we conclude that the interests the Organizations seek to protect are "germane" to their purposes. *See Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441. The Organizations' activities are centered on voter education and registration. Such activities are directly related to the individual member's interests in counseling and registering voters free from unwarranted governmental intrusions.

Third, the relief sought by the Organizations does not require the participation of individual members in the suit. *See id.* The principal claims are for injunctive and declaratory relief; such equitable relief is particularly suited for group representation. *See Warth*, 422 U.S. at 515, 95 S.Ct. at 2213. Thus, we conclude that the Organizations have standing to sue for equitable relief.

II. INJUNCTIVE RELIEF

The appellants sought to enjoin a preliminary investigation by a United States Attorney. The district court dismissed the appellants' complaint on the grounds that "as a matter of law" it lacked "jurisdiction to enjoin or otherwise control" such an investigation. We review this legal question *de novo*. *See United States v. Oregon*, 718 F.2d 299, 303 & n. 5 (9th Cir.1983). We conclude that the district court erred in ruling that it lacked jurisdiction. *See Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (district court has jurisdiction to enjoin illegal conduct by a prosecutor). Therefore, the district court erred in dismissing the injunctive claims. We remand this issue to the district court to determine whether an injunction should issue.

III. DECLARATORY RELIEF

The district court granted summary judgment for the Government on the appellants' claim for declaratory relief. We determine *de novo* whether, viewing the evidence in the light most favorable to the party against whom summary judgment has been granted, the moving party has demonstrated that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Continental Casualty Co. v. City of Richmond*,

763 F.2d 1076, 1078-79 (9th Cir.1985); Fed.R.Civ.P. 56(c).[8]

A. *Equal Protection Claims*

1. *Level of Scrutiny*

The United States Attorney's investigation of voter fraud registration in the nine-county area targeted recently registered, foreign-born voters who requested bilingual ballots. The appellants contend that such a classification must be subjected to strict scrutiny under equal protection clause analysis because it discriminates on the basis of language, race, and national origin.

The district court analyzed the case by defining the classification solely on the basis of language and held that the classification does not involve a suspect class. Accordingly, the district court refused to apply the strict scrutiny standard and held that there was no equal protection violation.

Stated simply, the challenged investigation targeted recently registered, foreign-born voters who requested bilingual ballots. Bilingual ballots are only available in Spanish and Chinese. Therefore, as a practical matter, the investigation targeted Spanish-speaking and Chinese-speaking immigrants.

The traditional indicia of a suspect classification are whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the ma-

[8] The district court erroneously applied the good faith immunity standard of *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), to grant summary judgment on the entire case. Qualified immunity, however, is only a defense to damages and does not bar equitable relief. *Wood v. Strickland,* 420 U.S. 308, 314 n.6, 95 S.Ct. 992, 997 n.6, 43 L.Ed.2d 214 (1975).

joritarian political process." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973). Whether the classification is based on an immutable characteristic is sometimes an indication of a suspect class. *See Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). But immutability is not the sole determining factor. For example, the Supreme Court has held that aliens form a suspect class. *See Bernal v. Fainter*, 467 U.S. 216, 219, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984); *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).

Congress has explicitly recognized that pervasive discrimination exists against linguistic minorities by requiring state governments to provide bilingual ballots even though their voters must achieve a minimum level of fluency in English to obtain United States citizenship.

> The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. . . . [T]hey have been denied equal educational opportunities by State and local governments resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation.

42 U.S.C. § 1973b(f)(1).

Moreover, an individual's primary language skill generally flows from his or her national origin. *See Yu Cong Eng v. Trinidad*, 271 U.S. 500, 517, 46 S.Ct. 619, 623, 70 L.Ed. 1059 (1926); *Berke v. Ohio Department of Public Welfare*, 628 F.2d 980, 981 (6th Cir.1980) (per curiam); 29 C.F.R. § 1606.7(a). The target groups in this

case are distinct and easily identifiable. Just as persons of different ethnic groups are distinguished by surnames, *Hernandez v. Texas*, 347 U.S. 475, 480 n. 12, 74 S.Ct. 667, 671 n. 12, 98 L.Ed. 866 (1954) (Spanish surnames reliably identify Hispanics, treated as a suspect class), persons of different nationalities are often distinguished by a foreign language. Here it is clear that the investigation targeted Chinese and Hispanic immigrants. The courts have long recognized the history of discriminatory treatment inflicted on Chinese and Hispanic people. *See, e.g. Hernandez v. Texas*, 347 U.S. at 475, 74 S.Ct. at 667; *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

In contending that a language-based classification is not the equivalent of a national origin classification, and thus does not denote a suspect class, the Government relies on *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983) (English-only Social Security notices do not violate Spanish-speaking claimants' equal protection rights), *cert. denied*, 466 U.S. 929, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (English-only Civil Service exams do not violate Hispanic individuals' equal protection rights); *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir.1980) (employer's English-only rule did not violate Title VII or section 1981), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); and *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir.1978) (no right to bilingual education).

These cases are readily distinguishable from the instant case. They all involve a general classification of English-speaking versus non-English-speaking individuals. *See, e.g., Soberal-Perez*, 717 F.2d at 41. The instant case as a practical matter, however, involves a specific classification of Spanish-speaking and Chinese-speaking immigrants.

Thus, while a non-English-speaking classification is facially neutral with respect to ethnic group classification, the classification challenged here is not, because for all practical purposes it is a classification based on race and national origin.

Therefore, we hold that the three characteristics, i.e., foreign-born voter, recently registered voter, and bilingual ballot voter, taken together in the instant case form a class that has the traditional indicia of a suspect classification based on race and national origin. Accordingly, the district court erred in not applying the strict scrutiny standard to the equal protection issue raised in this case.

2. *Analysis*

We have concluded that the voter registration fraud investigation directed toward foreign-born, recently registered voters, requesting bilingual ballots involves a suspect classification. To survive an equal protection challenge under the strict scrutiny standard, a suspect classification must be necessary to serve a compelling governmental interest, and the governmental conduct must employ the least drastic means to achieve that compelling interest. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184-5, 99 S.Ct. 983, 990-1, 59 L.Ed.2d 230 (1979). Appellants concede that the government has a compelling interest in preventing voter registration fraud. *See Dunn v. Blumstein*, 405 U.S. 330, 345, 92 S.Ct. 995, 1004, 31 L.Ed.2d 274 (1972).

Because it failed to apply strict scrutiny analysis, the district court must determine on remand whether the classification used by the government is "necessary" to prevent voter registration fraud, and whether the investigation conducted was the least drastic means of achieving that governmental interest.

B. ***Substantive Due Process***

Voting is a fundamental right. *E.g., Dunn*, 405 U.S. at 336, 92 S.Ct. at 999. Classifications that burden the right to vote can be upheld only if they are necessary to advance a compelling governmental interest. *Id.* Moreover, the classification must be closely tailored to effectuate only that interest. *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2d 618 (1978).

The appellants argue that the voter registration investigation had the practical effect of intimidating foreign-born citizens from registering to vote and from requesting bilingual voting materials. The appellants also contend that the number of new registrants in the final weeks decreased even though normally that is the most successful period for voter registration drives. Thus, there is a material issue of fact as to whether the classifications burdened the appellants' right to vote, and the district court erred in granting the government's summary judgment motion on the substantive due process issue.

C. ***Voting Rights Act***

The district court dismissed the Voting Rights Act claim against Russoniello, Ilchirt, and the county officials on the basis that the Act does not expressly provide for a right of action against federal officials. However, as discussed below, we find that the appellants have failed to establish a Voting Rights Act violation. To establish a Voting Act violation, unlike a constitutional violation of a citizen's right to vote, the plaintiff must show an intent to deny or abridge the right to vote. Thus, we need not decide whether a claim for relief against federal officials may be asserted under the Voting Rights Act or whether the county officials would be protected as Russoniello's agents.[9]

---

[9] The appellants also ask for statutory damages under the Voting Rights Act. Private litigants have an action against state officials for

The appellants contend that Russoniello and the county defendants violated 42 U.S.C. § 1973b(f)(2), which reads:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *to deny or abridge* the right of any citizen of the United States to vote *because* he is a member of a language minority group.

[Emphasis added.)

The county officials applied a procedure to Spanish-speaking and Chinese-speaking voters that they did not apply to other voters. Voters requesting bilingual ballots were asked as part of the investigation to prove their citizenship and were questioned in some instances by the FBI. There is, however, no evidence that by investigating the individual appellants, the Government intended to deny or abridge their right to vote.[10]

Apparently, the appellants contend that the Government also violated 42 U.S.C. §§ 1971(b) and 1973i(b). Under these sections no person may intimidate, or attempt to intimidate any person from voting or from aiding someone to vote. In the instant case, there is evidence that the investigation did intimidate the appellants. However, that is insufficient. The appellants failed to raise a material

---

declaratory and injunctive relief under 42 U.S.C. § 1973c. *Allen v. State Board of Elections,* 393 U.S. 544, 555, 89 S.Ct. 817, 826, 22 L.Ed.2d 1 (1969). The Act, however, does not specify any statutory damage remedies for private plaintiffs. Because the appelants have failed to establish that a Voting Rights Act violation exists, we need not decide this issue.

[10] The county officials also contend that their participation in the investigation is too attenuated to constitute a violation of 42 U.S.C. § 1973b(f)(2). They argue that their only role was to disclose public records, and that their participation did not interfere with anyone's right to vote. Because there is no Voting Rights Act violation, we need not reach this issue.

issue of fact as to whether the government officials did in fact *intend* to intimidate them. *See United States v. McLeod*, 385 F.2d 734, 740-41 (5th Cir.1967).

Nor is there a claim under 42 U.S.C. § 1973aa-1a. The appellants failed to set forth a factual basis for their allegation that the county officials failed to provide bilingual ballots in compliance with that section.

Therefore, there is no material issue of fact or law, and the district court did not err in granting summary judgment on the Voting Rights Act claims.

D. ***The First Amendment***

The appellants contend that the district court erred in dismissing their first amendment claim. They allege that the investigation directly interfered with their constitutional right of association and political expression.[11]

The record provides support for the appellants' assertions that the voter registration fraud investigation discouraged the Organizations' members from participating in associational activities. Some members asserted that participation dropped off because the in-

---

[11] The district court found that: (1) the minimal intrusion imposed by defendants' conduct was clearly outweighed by the government's interest in preventing voter fraud; and (2) to the extent that plaintiffs allege defendants' actions "chilled" their first amendment rights merely by conducting the investigation, the complaint must be dismissed for failure to state a claim, *Laird v. Tatum,* 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972).

A dismissal under *Laird* would not be a dismissal for failure to state a claim, but a dismissal for lack of jurisdiction. In *Laird,* the parties challenging the Army's surveillance operations were not, themselves, targets of the surveillance. The Court held that, in this context, allegations of a subjective "chill," without more, were not sufficient to confer standing. 408 U.S. at 13-14, 92 S.Ct. at 2325-26.

Laird is factually distinguishable from this case, where the parties challenging the investigation are *targets* of the investigation. Here, the appellants clearly have standing to assert their first amendment rights.

vestigation: (1) discredited the Organizations' activities in their communities; (2) caused members to lose confidence in the democratic process; and (3) targeted members for a prosecutorial investigation. The government did not refute any of these assertions.

Therefore, viewing the evidence in the light most favorable to the appellants, there is a material issue of fact as to the extent of the burden on the appellants' first amendment rights. Thus, the district court erred in finding as a matter of law that the Government's interest in preventing voter fraud outweighed the appellants' first amendment interests. We also remand this issue to the district court.

IV. DAMAGE CLAIMS

The appellants' complaint may be read to include a request for damages based on constitutional or statutory claims such as section 1983, 42 U.S.C. § 1983. We agree with the district court that the government officials involved in this action would be entitled to immunity from such damage claims.

State prosecutors are absolutely immune from damage suits with respect to their quasi-judicial activities. *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 994-95, 47 L.Ed.2d 128 (1976). Federal prosecutors are also absolutely immune with respect to their quasi-judicial activities, *Butz v. Economou*, 438 U.S. 478, 516-17, 98 S.Ct. 2894, 2915-16, 57 L.Ed.2d 895 (1978); however, they receive only good faith immunity for prosecutorial activities that are merely administrative or investigative, *Jacobson v. Rose*, 592 F.2d 515, 524 (9th Cir.1978), *cert. denied*, 442 U.S. 930, 99 S.Ct. 2861, 61 L.Ed.2d 298 (1979). Other executive officials are entitled to qualified immunity, *see e.g., Scheuer v. Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1691-92, 40 L.Ed.2d 90 (1974) (state executive officials).

We need not determine whether the district court erred in denying absolute immunity, because we agree that as a matter of law all those sued are entitled at least to qualified, good faith immunity. The controlling standard is "the objective reasonableness of an official's conduct, as measured by reference to *clearly established* law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982) (emphasis added).

Under this objective standard, all the government officials are entitled to immunity. In the instant case, all of the appellants' claims under the Voting Rights Act and the first, fifth, fourteenth, and fifteenth amendments to the Constitution raise issues of first impression. Therefore, the government officials did not violate "clearly established" rights.

V. ATTORNEY'S FEES

The appellants seek costs and attorney's fees for the appeal pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, and the Equal Access to Justice Act, 28 U.S.C. § 2412. We grant costs pursuant to 28 U.S.C. § 2412(a) because the appellants have prevailed in part on appeal. *Cf. Thomas v. SS Santa Mercedes*, 572 F.2d 1331, 1335 (9th Cir. 1978). We deny the appellants' request for attorney's fees on appeal, however, because the appellants did not prevail on their section 1983 claims, *see* 42 U.S.C. § 1988, and because we are unable to say that the government's position on appeal was not substantially justified, *see* 42 U.S.C. § 2412(d). The appeal raised issues of first impression. *See Foster v. Tourtellotte*, 704 F.2d 1109, 1113 (9th Cir.1983).

AFFIRMED in part and REVERSED in part and REMANDED for further proceedings in light of this opinion.

WALLACE, Circuit Judge, with whom SNEED, ALARCON, and BEEZER, Circuit Judges, join, dissenting:

I dissent from the majority's opinion in this case and adhere to the analysis originally stated in the withdrawn panel opinion, *Olagues v. Russoniello*, 770 F.2d 791 (9th Cir.1985) (*Olagues I*), *withdrawn for rehearing en banc*, Nos. 82-4427, 83-2581 (9th Cir. Jan. 21, 1986). Although I agree with part of the majority opinion, I believe the majority's reasoning is deficient in several respects. I do not agree with the majority's conclusion that Olagues has standing to seek injunctive relief absent a substantial possibility that he will be subjected to a future investigation of voting abuses. In addition, I see no reason to remand this case since the district court would lack the power to grant injunctive relief. Finally, I believe that the majority is wrong in requiring that the language-based classifications challenged here be subject to strict scrutiny.

I

In its description of the facts in this case, the majority omits crucial information regarding the genesis and scope of Russoniello's investigation. *See Olagues I,* 770 F.2d at 794. The United States Attorney had received information from the Santa Clara County district attorney which indicated that a substantial number of recently registered foreign-born voters were noncitizens who had been registered illegally. The information was based on a study of recent registrants whose primary language skill was not English. Many of the noncitizen registrants apparently believed, or were told, that they were entitled to register and vote on the basis of long periods of residence in this country or of marriage to United States citizens.

The United States Attorney was justifiably concerned that the right of citizens to vote was being diluted by wholesale registration of noncitizens. He therefore

launched a carefully-crafted investigation to determine whether there existed in Santa Clara County, and surrounding counties, any organized effort to register noncitizens to vote. Such a conspiracy would be punishable under federal law. *See* 42 U.S.C. § 1973dd-3(c). He sought a random sampling of names from voters registration lists of recently registered foreign-born voters who had requested bilingual ballots in each of these counties. Based on information the United States Attorney has received, this group was most likely to yield individuals who had been illegally registered. Noncitizens are more likely to request bilingual ballots, if only because knowledge of English is generally *required* before a foreign born individual may become a naturalized citizen. *See* 8 U.S.C. § 1423(1). Bilingual ballots were provided in Spanish and Chinese in the relevant counties because of large Hispanic and Chinese communities. Voter registration drives had recently been conducted in those communities, and possibly were connected to the registration of large numbers of noncitizens.

After obtaining names of foreign-born voters who had requested bilingual ballots, the United States Attorney further refined the scope of his inquiry by asking the Immigration and Naturalization Service (INS) to verify the citizenship of the registrants. Only when the INS was unable to identify many of these persons as citizens did county district attorneys conduct interviews with possible noncitizen voters, at the request of the United States Attorney. The purpose of these interviews of registrants, as stated by the United States Attorney to the county district attorneys, was "to determine (1) the basis upon which they claim citizenship and entitlement to vote and (2) in cases in which they are unable to prove citizenship, what representations were made to them by Registrars as to their qualification to vote." Federal prosecution of registrants was neither contemplated nor threatened; the investigation

was instead conducted with the intent of identifying and possibly prosecuting any persons who conspired to register them illegally. No one was prosecuted on the basis of information obtained in the voluntary interviews, and the investigation was terminated.

II

I agree with the majority that this case is not moot, and that the organizations have standing sufficient to afford jurisdiction over this case. The majority's analysis adds little to what was stated in *Olagues I*. *Compare* maj. op. at 1515-1517, 1518-1519 *with Olagues I*, 770 F.2d at 794-96, 797-99. What it does add may muddy analysis of these issues. For example, it is unclear how the United States Attorney "raised the possibility that the state might prosecute [noncitizen registrants] under state law," maj. op. at 1519, in a way that could add to the organizations' standing. The federal and state governments are independent sovereigns, and the United States Attorney has no power to initiate prosecutions under state law. The record clearly indicates that Russoniello was not concerned with and did not encourage any prosecutions under state law.

III

I do not agree that Olagues has standing to seek equitable relief in this case. No doubt, Olagues has standing to seek damages if his rights were violated by the government's investigations. However, the majority fails to recognize that with respect to equitable relief, Olagues's position is fundamentally different from that of the organizations. "[U]nlike Olagues, members who participated in the organizations' counseling activities and voter registration drives are potential targets of future prosecutions." *Olagues I*, 770 F.2d at 799.

The majority writes that "equitable relief is particularly suited for group representation." Maj. op. at 1519; *see Olagues I,* 770 F.2d at 799. On the facts of this case, I agree that the prosecutorial investigation was sufficiently "targeted" at the organizations to give them "case or controversy" standing. *See id.* at 798. I agree with the majority that the threat of another investigation, possibly followed by criminal prosecutions, may engender fear in its members "that participation in the program to register voters will make them targets of a criminal investigation," and that this in turn may hinder the organizations' protected activities. *See* maj. op. at 1518-1519. The point is that the organizations and their members "are threatened with possible prosecution for violations of the Voting Rights Act." Maj. op. at 1519. Olagues is not similarly threatened.

The majority's observation that Olagues differs from the plaintiffs in *Laird v. United States*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) (*Laird*), because those plaintiffs' "were not targets of" governmental investigation, maj. op. at 1518, adds little. It demonstrates only that this case is distinguishable from *Laird* because Olagues suffered a past injury. I agree that alleged past injury gives Olagues, unlike the plaintiffs in *Laird*, standing *to seek damages*. The majority errs by somehow extending this standing to seek relief for past injury into standing to seek relief for prospective injury. It is quite clear that such standing to seek damages is insufficient to afford standing for prospective relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 105-06, 109, 103 S.Ct. 1660, 1666-67, 1669, 75 L.Ed.2d 675 (1983) (*Lyons*).

Olagues has never been threatened with prosecution by federal authorities. Instead, "he seeks to enjoin prosecutorial activities which are focused on persons other than himself." *Olagues I,* 770 F.2d at 797. Although he was investigated because the government had reason to believe

that Olagues was a noncitizen who had been illegally registered to vote, the result of the investigation was to demonstrate that Olagues is a citizen, legally registered to vote. There is little reason to believe that the government will again investigate Olagues as a possible noncitizen voter. The majority does not explain how Olagues has made "a reasonable showing that he will again be subject to the challenged activity." Maj. op. at 1516. In fact, it appears highly unlikely that, even in the event of a similar future investigation, Olagues's name would again be drawn in a small random sample of *recently registered* bilingual voters from his country, or that he would again be mistaken for a noncitizen.

Even given the very remote possibility that the government might again investigate Olagues, the investigation in this case involved purely voluntary, noncoercive interviews—with no threat of federal prosecution. At best, Olagues, as a legally registered voter, can allege a de minimis "chilling effect" on his right to vote. It is difficult to understand how Olagues was "stigmatized" by the investigation, since it was not publicized, or how the majority finds it relevant that Olagues "was running for political office himself." Maj. op. at 1518. Olagues simply does not have standing to seek prospective relief.

IV

The majority also neglects to respect the special limitations on our power to enjoin criminal investigations by the executive branch of our government. *See Olagues I,* 770 F.2d at 799-801. "[A] court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of [a prosecutor] unless there is a clear basis in fact and law for doing so." *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977).

Without doubt, district courts may, under appropriate circumstances, have power to enjoin illegal prosecutorial actions. We recognized the possible existence of such power in *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (*Jett*), and indeed, the majority relies on *Jett*. Maj. op. at 1519. What the majority fails to recognize are the strict limitations we placed in *Jett* on the judiciary's power to enjoin prosecutorial investigations. In *Jett*, we held that federal courts may not supervise the executive's "preliminary conduct" in criminal prosecutions. *Jett*, 578 F.2d at 845. This conclusion was based on our concern for the constitutional separation of powers. *See id.* It was not premised on the desirability or legality of prosecutorial actions in any given case. We recognized that the separation of powers principle may not mandate judicial inaction in a case where the executive outrageously oversteps the limitations on prosecutorial power. Thus, we stated that a prosecutor "may be subject to a suit to enjoin *egregiously illegal* conduct." *Id.* (emphasis added).

Other courts have similarly recognized that "[o]nly the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations." *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C.Cir. 1978) (*Reporters Committee*), *cert. denied*, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979); *see also LaRouche v. Webster*, 566 F.Supp. 415, 417 (S.D.N.Y. 1983) (*LaRouche*) ("party seeking to enjoin a criminal investigation bears an almost insurmountable burden"); *see generally Olagues I*, 770 F.2d at 799-801. In the context of a good faith criminal investigation, the plaintiffs should be required to show "a *clear and imminent* threat of such future [prosecutorial] misconduct." *Reporters Committee*, 593 F.2d at 1071 (emphasis in original).

The majority acknowledges that the criminal investigation in this case was undertaken in good faith. *See* maj. op. at 1523 (based on the good faith standard, all individual defendants are entitled to immunity). There is nothing egregious about the prosecutorial conduct in this case. Nor is there any *imminent* likelihood that the investigation will be repeated. Because there are no extraordinary circumstances that outweigh general concerns regarding the separation of powers, I can only conclude that a federal court is powerless to award relief.

Jett's requirements for equitable relief against a prosecutorial investigation cannot be met on the facts alleged in this case. *Cf. Lyons*, 461 U.S. at 103, 105-06, 103 S.Ct. at 1666-67; *O'Shea v. Littleton*, 414 U.S. 488, 499-502, 94 S.Ct. 669, 677-79, 38 L.Ed.2d 674 (1974). If the district court applies the law of our circuit, it can only deny the plaintiff's claims for equitable relief. *See Jett*, 578 F.2d at 845. Thus, I see no reason for a remand.

V

I also dissent from the majority's conclusion that the language-based classifications used by Russoniello in this case must be subjected to strict scrutiny. Even if they are, the need for prosecutorial consideration of such factors is sufficiently compelling to survive the test.

A.

The majority attempts to distinguish several cases on the ground that "[t]hey all involve a general classification of English-speaking versus non-English-speaking individuals," while this case "as a practical matter . . . involves a specific classification of Spanish-speaking and Chinese-speaking immigrants." Maj. op. at 1521, *purporting to distinguish Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983) (*Soberal-Perez*), *cert. denied*, 466 U.S. 929,

104 S.Ct. 1713, 80 L.Ed.2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir.1975); *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir.1980) (*Garcia*), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir.1978).

I find the majority's ground for distinction of these cases "as a practical matter" to be extraordinarily vague. *Garcia*, for example, involved "a rule prohibiting employees from speaking Spanish on the job," which rule affected only those employees who were Hispanic. 618 F.2d at 266-67. Nevertheless, the court held that discrimination with respect to language was *not* equivalent to discrimination because of national origin. *Id.* at 268. It is not clear what "practical" distinction the majority intends to draw.

More importantly, I think that the foundation of the majority's purported distinction is conceptually flawed. Why, if a classification based upon English-speaking versus non-English-speaking persons implicates no suspect classification, does a classification between Spanish-speaking and non-Spanish-speaking persons raise special constitutional problems? The majority answers that "a non-English-speaking classification is facially neutral with respect to ethnic group classification." Maj. op. at 1521. Somehow, discrimination against speakers of minority languages is suspect, *unless* that discrimination is instituted across-the-board, against *all* minority languages, and in favor of the majority of English speakers alone. I suggest that this makes little sense. Either language is suspect, or it is not. Clearly it is not. *See Olagues I*, 770 F.2d at 801-02 (discussing Supreme Court precedent).

B.

Ultimately, the majority fails to hold that language-based classifications must be subjected to strict scrutiny. Instead, it holds that "the three characteristics, i.e., foreign born voter, recently registered voter, and bilingual ballot voter, taken together in the instant case form a class that has the traditional indicia of a suspect classification based on race and national origin." Maj. op. at 1521. This is a surprising conclusion.

If language by itself does not define a suspect classification, it is difficult to understand why the other factors considered by Russoniello—which narrowed his investigation—require strict scrutiny. The other two factors reflect the United States Attorney's efforts to narrow his inquiries to those persons who may have knowledge of serious criminal activity. It is the height of irony to hold, as the majority now implicitly does, that Russoniello's actions are suspect precisely because they are narrowly tailored to his purpose of uncovering crime. Certainly, he committed no invidious discrimination by focusing on foreign birth. With scant exceptions, anyone born in this country is a citizen. U.S. Const. amend. XIV, § 1; *United States v. Wong Kim Ark*, 169 U.S. 649, 682, 18 S.Ct. 456, 469, 42 L.Ed. 890 (1898) (excepting "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State"). The criminal activity he sought to root out was illegal registration of *non* citizens. Russoniello could not enforce the law against registration of noncitizens without considering the factor of foreign birth. Similarly, the factor of recent registration does not define or even suggest any invidious discrimination against a suspect class. It simply focused Russoniello's investigation on persons who had registered at a time that illegal registrations may have been rampant and who, if they were witnesses to criminal activity, would be more

likely to recollect details than would be long-registered noncitizen voters. No doubt, the United States Attorney will be puzzled that his efforts to narrow carefully the scope of his investigation are precisely the basis of the court's conclusion that his investigation is suspect and must be subjected to strict judicial scrutiny. The majority's opinion suggests that, on the other hand, had he been sloppy in defining the scope of his work and less concerned with the consequences of an over-broad investigation, the majority would perhaps review his actions more leniently.

C.

The majority applies strict scrutiny on the ground that the United States Attorney's language classifications *in practice* discriminated on the basis of race and national origin. Maj. op. at 1521. I instead agree with the Second Circuit that strict scrutiny of language classifications is warranted only when a plaintiff has shown an intent to discriminate on the basis of a suspect class. *See Soberal-Perez*, 717 F.2d at 42. To establish intentional discrimination, a plaintiff must demonstrate that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Id., quoting Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). A gulf separates our case from cases such as *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), in which a facially neutral statute was administered "with an evil eye and an unequal hand" to discriminate against a minority on the basis of race or national origin. The majority fails to bridge that gulf.

To the extent that the language classifications enabled the United States Attorney to reach persons of Chinese or Hispanic ancestry, it is apparent that recently-registered

voters from the Chinese-American and Hispanic-American communities were most likely to be able to furnish him with valuable information for the criminal investigation of a pattern of illegal voter registration he had reason to believe was occurring in those communities. We have no reason to believe that his decision to interview these persons was motivated by anything other than a desire to investigate potentially serious criminal activity, and indeed the majority concedes that the investigation was conceived and conducted in good faith. Maj. op. at 1523. No discriminatory intent can be inferred.

Finally, I observe that considerations of national origin or race are relevant in many prosecutorial investigations conducted by the executive branch. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87, 95 S.Ct. 2574, 2582-83, 45 L.Ed.2d 607 (1975). (Mexican appearance may be considered in decision to stop automobile to question occupants regarding immigration violations). Under the majority's analysis, if officers had reason to believe that a murder had been committed in the Chinese-American community by a Chinese-American, their decision to interview Chinese-Americans in hopes of obtaining leads would be subjected to exacting scrutiny. I cannot agree that such choices are properly subjected to heightened scrutiny. Nor can I agree that they would fail to pass muster if they were. Some degree of common sense must animate our constitutional interpretations. Such investigatory decisions are indeed necessary to serve the compelling interest of fighting crime in an efficient and effective manner.

VI

Olagues and the organizations also argue that the United States Attorney unconstitutionally burdened their right to vote and their first amendment rights. I reject their arguments on the grounds stated in *Olagues I*. *See* 770 F.2d

at 802. It is difficult to see how any "burden" was placed on anyone's right to vote since no individual citizen was denied his right to vote. Russoniello's preliminary inquiry was aimed at ferreting out potential voting fraud, in order to enhance the right to vote of those who qualified. Individual citizens who were initially identified as not qualified were thereafter only the subject of narrowly confined, noncoercive follow-up interviews probing potentially unlawful activities of others. Even if we construe this as a "burden," it is a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct.

Similarly, the incidental burden (if any) that may have been placed on first amendment associational rights must give way to the government's need to ensure the sanctity of the polls. Investigative activity inherently "affects or 'implicates' First Amendment activity." *Reporters Committee*, 593 F.2d at 1059 (emphasis omitted). The review of public records cannot involve any violation of first amendments rights. Moreover, the follow-up questioning of potential witnesses also is lawful. *See, e.g., Jones v. Unknown Agents of the Federal Election Commission*, 613 F.2d 864, 877-78 (D.C.Cir.1979) (upholding questioning of campaign contributors regarding illegal contributions), *cert. denied*, 444 U.S. 1074. 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980); *La-Rouche*, 566 F.Supp. at 418 ("As long as reasonable cause to investigate exists, the mere asking of material questions does not constitute a First Amendment violation.")

For all of the above reasons, I would affirm the judgment of the district court.

HUG, Circuit Judge, dissenting:

I dissent from the majority opinion because I conclude the case is moot. The majority opinion acknowledges in Section IV that the appellants cannot, as a matter of law, establish a claim for damages because the government

officials are entitled to immunity. Thus, the only possible viable claim is for injunctive or declaratory relief.

As the majority opinion properly notes, claims for declaratory or injunctive relief become moot when the challenged activity ceases, unless one of the limited exceptions identified in the majority opinion comes into play. I find insufficient grounds to invoke an exception.

The investigation was brought about by allegations of particular voter fraud; these were investigated and the matter was dropped, with no charges filed or further investigation sought. There is no threat of continued investigation nor any contention that there is any suspected voter fraud that would again lead to such an investigation. I conclude that there is insufficient indication that there again would be the allegations of voter fraud sufficient to bring about a similar investigation, that the investigation would be pursued in the same fashion, or that the county officials would participate in the same way in such an investigation. Nor do I discern any substantial continuing effects from the past investigation sufficient to sustain a finding of a live controversy. Therefore, I conclude that the claims for injunctive and declaratory relief are moot under the authority of *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) and *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). I would affirm the summary judgment on the claims for damages and remand the claims for injunctive and declaratory relief to be vacated as moot.

SNEED, Circuit Judge, concurring in Circuit Judge Wallace's dissent:

I concur in Judge Wallace's dissent. I write only to underscore Judge Wallace's dissent.

The United States Attorney focused upon (1) recently registered, (2) foreign born voters, (3) who requested bilingual ballots. Only Spanish and Chinese bilingual ballots existed. The purpose was to determine if any such persons were not United States citizens. Non-citizens were not entitled to vote.

The heart of the majority opinion appears in the following lines:

> "The instant case as a practical matter, however, involves a specific classification of Spanish-speaking and Chinese immigrants. Thus, while a non-English-speaking classification is facially neutral with respect to ethnic group classification, the classification challenged here is not, because for all practical purposes it is a classification based on race and national origin." Maj. Opinion, p. 1521, lines 13-19.

No further explanation is offered. The United States Attorney's target was noncitizens attempting to vote. That is not a suspect class. True, his investigation was aimed at a possibly large pool of offenders. That Hispanics and Chinese make up that pool is the consequence of geography, history, and the Voting Rights Act, not the discriminatory bias that the majority ascribes to the fact. One does not have to hold a doctorate in history to know that voting by non-citizens has occurred in our nation's history from time-to-time. Had the plaintiffs' alleged that the United States Attorney commenced his investigation to abridge the right of Chinese and Hispanic citizens to vote, an action under the Voting Rights Act would have been alleged. The majority correctly holds no such claim was alleged.

The classification employed by the United States Attorney was crafted to discover fraudulent voting. It was "for all practical purposes" nothing more.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-4427
D.C. No. CV-82-2102

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS-APPELLEES.

No. 83-2581
D.C. No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS, CHINESE FOR AFFIRMATIVE ACTION, AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; O'MALLEY, WILLIAM A., INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; UNDERWOOD, LON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; SMITH, ARLO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY, ET AL., DEFENDANTS-APPELLEES.

[Filed Jan. 21, 1986]

ORDER

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, SNEED, KENNEDY, ANDERSON, HUG, TANG, SKOPIL, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, FERGUSON, NELSON, CANBY, BOOCHEVER, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, AND KOZINSKI, Circuit Judges.

Upon the vote of a majority of the regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Rule 25 of the Rules of the United States Court of Appeals for Ninth Circuit. The previous three-judge panel assignment is withdrawn.

/s/ JAMES R. BROWNING
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 82-4427, 83-2581

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS-APPELLEES.

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS, CHINESE FOR AFFIRMATIVE ACTION, AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; O'MALLEY, WILLIAM A., INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; UNDERWOOD, LON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; SMITH, ARLO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY, ET AL., DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of California.

Argued and Submitted Sept. 12, 1984

Decided Sept. 3, 1985

Before WALLACE, ALARCON, and NELSON, Circuit Judges.

WALLACE, Circuit Judge.

Olagues, a citizen, and certain organizations promoting the voting rights of Chinese Americans and Hispanic or Chinese ethnic backgrounds in the San Francisco Bay area (the organizations) sued for damages and declaratory and injunctive relief arising from a preliminary investigation by the United States Attorney and various state officials into possible violations of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(c), (d) (the Act), which prohibits the illegal registration of voters or conspiracies to illegally register voters. Olagues and the organizations claim violations of their rights under the Act and the first, fifth, fourteenth, and fifteenth amendments to the Constitution. The district court dismissed the injunctive claims on the ground that it lacked jurisdiction to enjoin an investigation by the United States Attorney. The district court also granted summary judgment in favor of the United States Attorney and the state officials on the remaining claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

In March and April of 1982, United States Attorney Russoniello received information from the Santa Clara County district attorney indicating that a substantial number of foreign-born individuals who had recently registered to vote were not United States citizens. The information was contained in a study of recent voter registrants whose primary language was not English. Many of the noncitizen registrants apparently believed or

were told that they were entitled to vote on the basis of marriages to United States citizens or a long period of residence in the United States. Russoniello also was informed that the Spanish translation of the voter registration form erroneously stated that registrants "should be" a United States citizen, rather than stating one "must be" a citizen.

Russoniello then sent a letter on April 19, 1982, to law enforcement officers and voter registrars in nine local counties within his jurisdiction requesting their cooperation in obtaining a sampling of names from voter registration lists in order to determine whether the improper registration problem noticed in Santa Clara County was more widespread. The letter requested the forwarding of 25 names, randomly selected of recently registered, foreign-born voters who requested bilingual ballots. The letter indicated that upon receipt of the sampling, the names would be forwarded to the Immigration and Naturalization Service (INS) to determine each individual's citizenship status. He recommended that those individuals who the INS indicated were not citizens be interviewed thereafter. Russoniello stated that he did not intend to prosecute any improperly registered voters, but that he would consider prosecuting individuals who deliberately conspired to register unqualified voters if evidence of such impropriety surfaced.

The local officials responded by forwarding the names of 168 persons, one of whom was Olagues, from the public voting lists which were subsequently checked by the INS. At Russoniello's request, local officials then conducted voluntary interviews with some of the 113 individuals whom the INS could not positively identify as citizens to determine their citizenship and, if the individuals proved

not to be United States citizens, the circumstances surrounding their registration. No further investigation occurred.

II

Because the investigation has terminated, we first must determine whether there remains a live controvesy for purposes of granting equitable relief. There is no question that a controversy remains with respect to damages.

We begin this analysis with the recognition that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy" for equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (*O'Shea*). Claims for equitable relief therefore become moot when the challenged activity ceases if subsequent events show that the activities "could not reasonably be expected to recur," *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1009 (9th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct, 1047, 59 L.Ed.2d 90 (1979), unless there is a possibility of "continuing, present adverse effects." *O'Shea*, 414 U.S. at 496, 94 S.Ct. 676.

There is a heavy burden, however, on the defendant to show that there is no reasonable expectation of repetition. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953) (*W.T. Grant*). Voluntary cessation of the challenged activity by the official is insufficient to render a case moot if "the legality of the challenged practices" is still in dispute because "[t]he defendant is free to return to his old ways." *Id.* at 632, 73 S.Ct. at 897. *See Allee v. Medrano*, 416 U.S. 802, 810-11, 94 S.Ct. 2191, 2197-98, 40 L.Ed.2d 566 (1974); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir. 1982) (claim is moot if subsequent "events have completely and irrevocably eradicated

the effects of the alleged violation"). Moreover, a case or controversy for purposes of article III may also remain live following cessation of the challenged activity if the actions are capable (1) of repetition and (2) of evading review. *See, e.g., Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 122, 94 S.Ct, 1694, 1698, 40 L.Ed.2d 1 (1974). Finally, the existence of "a public interest in having the legality of the practices settled . . . militates *against* a mootness conclusion." *W.T. Grant,* 345 U.S. at 632, 73 S.Ct. at 897 (emphasis added).

Applying this framework to the case before us, we find several factors pointing toward the continuing existence of a case or controversy for purposes of evaluating plaintiffs' equitable claims. First, the United States Attorney did not voluntarily cease the challenged activity because he felt that the investigation was improper. Rather, Russoniello terminated the investigation solely because it failed to produce evidence supporting any further investigative activities. Russoniello has at all times continued to argue vigorously that his actions were lawful.

Second, there has been no showing that an investigation conducted in the same manner against the same groups would not recur. Although Russoniello and the state officials point out that the Director of the Census now has determined that these counties no longer must provide bilingual ballot materials *see* 49 Fed. Reg. 25,887-88 (June 25, 1984), Olagues and the organizations correctly observe that election officials in San Francisco, Santa Clara, Alameda and Monterey counties will continue to provide the same bilingual ballot materials as previously required by section 203(b) of the Voting Rights Act, 42 U.S.C. § 1973aa-1a(b). Thus, Russoniello will continue to have the means available to conduct an investigation similar to the one challenged here. It is immaterial that the tools useful for discriminatory purposes are furnished by the

state rather than by the federal government; what matters is whether federal officials may utilize them.

Russoniello is certainly empowered to investigate election fraud; it would not be unreasonable to believe that a similar investigation might arise at some point in the future. Thus, the same issues are capable of repetition. At the same time, these investigations, such as the one in the present case, may be of very short duration, making them effectively capable of evading review by an appellate court. *E.g., Nebraska Press Association v. Stuart,* 427 U.S. 539, 546-47, 96 S.Ct. 2791, 2796-97, 49 L.Ed.2d 683 (1976).

Other factors also suggest a live controversy. The organizations argue that their organizational efforts have been handicapped as a result of the fear engendered by this investigation. They contend that unless the legality of the investigation is determined, they may continue to suffer these chilling effects despite the termination of the initial investigation. Furthermore, there is a significant public interest in addressing both the appropriateness of permitting a challenge to a federal investigation, which raises separation-of-powers concerns, and the appropriateness of the investigatory methods employed, which raises voting rights and first amendment concerns.

This case is distinguishable from *O'Shea* and *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (*Lyons*). In *O'Shea,* the plaintiffs challenged certain arrest and bail procedures employed by state law enforcement and judicial officials. In order to be subject to these alleged unlawful procedures, however, one would first have had to violate some law and then have been arrested. 414 U.S. at 496, 94 S.Ct. at 676. The Supreme Court found that plaintiffs failed to show any case or controversy because it presumed that plaintiffs would obey the law, and therefore they never would become subject to any unlawful procedures in the future. *Id.* at 497, 94 S.Ct.

at 676. Unlike the situation before us, the *O'Shea* plaintiffs did not claim any constitutional right to act as they had prior to their arrest. *See id.* at 498, 94 S.Ct. at 677. In *Lyons,* the plaintiff challenged the use of chokeholds by Los Angeles police on arrestees. The Court again held that there was no case or controversy for equitable relief because whether Lyons would again be arrested and subjected to a chokehold a second time was purely speculative. *See* 461 U.S. at 105-06, 103 S.Ct. at 1667.

Here, Olagues and the organizations claim that the actions of the officials have interfered with their constitutionally protected first amendment activities in registering voters. Unlike *O'Shea* and *Lyons,* neither Olagues nor the organizations had to break any law in order to be subjected to alleged unlawful conduct by the officials. Certainly the legality of the investigation at issue remains in dispute; both sides continue forcefully to advocate their positions. Russoniello has never seriously attempted to make any showing that the challenged investigative techniques will never be employed again; rather, he vigorously defends his investigative tactics. Thus, he fails to meet his "heavy burden" of showing mootness. *W.T. Grant,* 345 U.S. at 633, 73 S.Ct. at 897.

III

We next examine the standing of Olagues, a foreign-born citizen who requested bilingual election materials, and the organizations, which claim that the challenged investigatory activities will "effectively deny their right to participate in the electoral process."

We recently summarized the law relating to standing required by article III of the Constitution:

> Standing is a threshold question in every case before a federal court. Before the judicial process may be invoked, a plaintiff must "show that the facts

> alleged present the court with a 'case or controversy' in the constitutional sense and that [he] is a proper plaintiff to raise the issues sought to be litigated." A party seeking to invoke the court's authority must demonstrate "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends. . . ."
>
> The question of whether the plaintiff has standing involves both constitutional and prudential limitations. The constitutional limitations of article III involve three separate but interrelated components: first, a "distinct and palpable" injury to the plaintiff, be it "threatened or actual"; second, a "fairly traceable causal connection" between that injury and the challenged conduct of the defendant; and third, a "substantial likelihood" that the relief requested will redress or prevent the injury.

McMichael v. County of Napa, 709 F.2d 1268, 1269-70 (9th Cir. 1983) (citations omitted).

Olagues would generally have standing under the Act if he is an "aggrieved person," broadly defined as one who has suffered an injury, *See Allen v. State Board of Elections,* 393 U.S. 544, 554-57, 89 S.Ct. 817, 825-27, 22 L.Ed.2d 1 (1969) (*Allen*). He has alleged an injury: his request for a bilingual ballot triggered an investigation of his records by the FBI and the INS and an interview by the local District Attorney. Juxtaposed against the holding in *Allen,* however, is the general bar against the invocation of federal equity jurisdiction in criminal prosecutions when the plaintiff is not being prosecuted or threatened with prosecution. *See Linda R.S. v. Richard D.,* 410 U.S. 614, 617-19, 93 S.Ct. 1146, 1148-49, 35 L.Ed.2d 536 (1973); *Younger v. Harris,* 401 U.S. 37, 50-54, 91 S.Ct. 746, 753-55, 27 L.Ed.2d 669 (1971) (*Younger*). In order to

harmonize these conflicting strains of precedent arising in this particular factual circumstance, we find it necessary to focus on the nature of the relief sought by Olagues.

Here, Olagues is not seeking any affirmative injunctive relief in order to permit him to vote, such as demanding that he be listed as an eligible voter. Rather, he seeks to enjoin prosecutorial activities which are focused on persons other than himself. Moreover, it does not appear that Olagues has demonstrated that he would suffer irreparable harm without equitable relief. Unlike the organizations, who allege that their current voter registration efforts are being hindered by the fear that they may possibly be subject to a similar investigation in the future, the possibility that Olagues's voter registration records will be scrutinized again is entirely speculative. Olagues thus faces the barrier of *Lyons,* which emphasizes that the irreparable harm showing is "a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." 461 U.S. at 111, 103, S.Ct. at 1670.

Under these circumstances, we conclude that Olagues has failed to overcome the prudential limitations on standing that are particularly important when evaluating claims for equitable relief regarding a criminal investigation. The injuries he alleges are insufficient to warrant such an intrusive remedy. Since he is a citizen, it cannot be seriously contended that Olagues has been or will be denied his right to vote as a result of an examination of public records. No official action has been taken against him, other than verifying his citizenship status along with those individuals who were initially identified as improperly registered. The principal claim of present injury is that the investigation has had a "chilling effect" on and "stigmatized" him. However, mere "allegations of a subjective 'chill' " do not suffice to present a justiciable claim. *Laird v. Tatum,* 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154

(1972). We need not pass on the "stigma" claim as a basis for standing. The only time it could have arisen was after public disclosure that the investigation was taking place, which apparently was self-induced by the filing of this lawsuit. In the absence of standing to pursue equitable relief, Olagues' individual claim for relief is therefore relegated to one for damages only for any direct injuries which might have occurred as a result of the investigation directed at others. *See Lyons*, 461 U.S. at 111, 103 S.Ct. at 1670 (damage remedy is adequate when there is no showing of future injury).

The organizations' standing requires more extensive analysis. Chinese for Affirmative Action is a voluntary membership group that seeks to protect the rights of Chinese-Americans. It monitors compliance with bilingual election requirements and encourages Asian-Americans to register and to vote. The Hispanic Coalition for Human Rights is an association of Hispanic organizations and persons of Mexican descent, with a goal of securing the civil rights of Hispanics. It encourages them to register and to vote, and advises them on the availability of bilingual election materials. The San Francisco Latino Voter Registration Education Project is a coalition of Hispanic groups that was conducting a voter education and registration drive at the time of the investigation. The organizations allege that the investigation has hindered their efforts to encourage citizens of Hispanic and Chinese ethnic backgrounds to participate in the electoral process and that is was aimed at investigating how they registered voters, thus intimidating them in such activities. They also fear disclosure of their organizational membership. They claim direct injury both to themselves and to their members.

An associational plaintiff has standing to seek redress of direct injury to the organization itself. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S.

26, 27, 40, 96 S.Ct. 1917, 1919, 1925, 48 L.Ed.2d 450 (1976) (*Simon*); *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975) (*Warth*); *NAACP v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). Under certain circumstances, an association may also be entitled to seek redress of injury to its members. *See, e.g., Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 342, 97 S.Ct. 2434, 2440, 53 L.Ed.2d 383 (1977) (*Hunt*); Simon, 426 U.S. at 40, 96, S.Ct. at 1925; *Warth*, 422 U.S. at 511, 95 S.Ct. at 2211; *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972) (*Sierra Club*). In *Hunt*, the Supreme Court established a three-part test to determine whether an association has standing: (1) either the group or its members must have suffered some direct, cognizable injury; (2) the interests the group seeks to protect must be "germane to the organization's purpose"; and (3) the claim or relief sought must not require the participation of the individual members in the suit. 432 U.S. at 343, 97 S.Ct. at 2441. A mere "abstract concern," *Simon*, 426 U.S. at 40, 96, S.Ct. at 1925, or "special interest" in a public issue, *Sierra Club*, 405 U.S. at 739, 92 S.Ct. at 1368, however, is legally insufficient to confer standing.

The organizations claim standing on two grounds. First, they assert a direct injury: their voter registration and educational efforts have been hindered as the direct result of the challenged investigation, in violation of their first amendment and associational rights. They claim that the investigation has discouraged members from participating in their associational activities and that it will lead to disclosure of organizational membership, thus undermining their voter education and registration efforts. Because the investigation involved questioning of voter registrants

as to who had assisted them in registering, they contend, it inherently delved into their associational activities and membership in violation of their constitutional rights.

Second, the organizations assert that both they and their members are threatened with possible prosecution for violations of the Voting Rights Act. They cite Russoniello's letter as evidence that such prosecution was possible. They further assert that they are undoubtedely the targets of Russoniello's investigation and may be charged with improperly influencing ineligible persons to register.

A preliminary issue is whether the investigation may be fairly characterized as having been "targeted" at these organizations or their members. The investigation sought to determine whether there existed any unlawful conspiracies to register ineligible foreign-born voters. The random sample of voters employed focused solely on foreign-born registrants who sought bilingual ballots. Russoniello's letter indicates that groups targeting citizens of Chinese and Hispanic ethnic backgrounds were the source of his concern. Although he stated that he did not challenge their right to conduct registration drives, he did not disavow future prosecutions against persons conspiring to register noncitizens. When any voter whose name was chosen at random initially appeared to be unqualified, he sought follow-up questioning to determine who registered the voter and what representations had been made as to the qualifications necessary to vote. It is not difficult to conclude from this fact that the investigation was sufficiently "targeted" at the organizations and their members for purposes of our analysis. Their principal activities were directed specifically at registering and counseling voters who would fall within the classification on which the investigation was based. That they were not specifically named as targets does not change this conclusion.

We now analyze these organizations' standing under *Hunt*'s three-part test. The first hurdle is whether the groups or their members may have suffered any direct, cognizable injury. We concede that the organizations' allegations raise sufficient claims of potential direct injury to both themselves and their members. The Supreme Court has recognized previously that a group may have standing even if it is only derivatively injured as the result of the prosecution or threat of prosecution of its members. *See Allee v. Medrano*, 416 U.S. 802, 829-30 & n. 6, 94 S.Ct. 2191, 2207 & n. 6, 40 L.Ed.2d 566 (1974) (Burger, J., concurring in part and dissenting in part). In the case before us, the organizations' voter education and the registration efforts are unquestionably protected from unwarranted interference by prosecutorial officials; whether the investigation actually involved any unwarranted intrusions into their associational activities solely affects the merits of their claim, not their standing. Moreover, unlike Olagues, members who participated in the organizations' counseling activities and voter registration drives are potential targets of future prosecutions. Thus, the bar to invocation of federal equity jurisdiction faced by a plaintiff who is not being prosecuted or threatened with prosecution is not applicable. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The next inquiry is whether the interests the organizations seek to protect are "germane" to the purposes of the organizations. *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441. We concluded that they are. The organizations' activities are centered on voter education and registration. Such activities are directly related to the individual members' interests in pursuing counseling and registration of voters free from unwarranted prosecutorial intrusions.

Finally, the relief sought by the organizations does not require the participation of individual members in the suit.

The principal claims are for injunctive and declaratory relief; such equitable relief is particularly suited for group representation. *See Warth*, 422 U.S. at 515, 95 S.Ct. at 2213. Thus, we conclude that the organizations have standing.

IV

Although a case may not be moot, a plaintiff still has the burden of showing that equitable relief is necessary, *see W.T. Grant*, 345 U.S. at 663, 73 S.Ct. at 897, and the mere possibility of future injury is insufficient to enjoin official conduct. Moreover, there must be "a strong showing of abuse" of discretion to overturn a denial of such relief. *Id.* We also keep in mind the Supreme Court's admonition that any injunction regarding government functions is generally only permitted in "extraordinary circumstances," *Rizzo v. Goode*, 423 U.S. 362, 379, 96 S.Ct. 598, 608, 46 L.Ed.2d 561 (1976), as officials should be given the "widest latitude" possible while performing their official duties. *Id.* at 378, 96 S.Ct. at 607.

The organizations seek to enjoin a preliminary investigation of a United States Attorney. The district court dismissed the organizations' complaint on the grounds that "as a matter of law," it lacked "jurisdiction to enjoin or otherwise control" such an investigation. We review the legal question of jurisdiction de novo. *E.g., United States v. Oregon*, 718 F.2d 299, 303 & n. 5 (9th Cir.1983). The district court erred in its ruling that it lacked jurisdiction. *See, e.g, Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (*Jett*).

We have recognized, however, that as a general proposition, a district court has no "power to monitor executive investigations before a case or controversy arises." *Jett*, 578 F.2d at 845. *See also United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc) ("courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal

prosecutions"), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965). We emphasized that intrusions into the investigative process of a United States Attorney present "difficult problems of separation of powers." *Jett*, 578 F.2d at 845. We therefore recognized that only in extraordinary circumstances would we entertain an action to enjoin a prosecutor's investigatory activities. *See id.* ("prosecutor may be subject to a suit to enjoin egregiously illegal conduct"). *See also United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.) ("a court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of [a prosecutor] unless there is a clear basis in fact and law for doing so," because of separation of powers constraints), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977) (*Chanen*).

The organizations alleged that the United States Attorney lacked a resonable basis for initiating the investigations. The district court should therefore have determined whether any extraordinary circumstances were present. Because we may affirm the district court's ruling on any basis fairly presented by the record, however, *see Keniston v. Roberts*, 717 F.2d 1295, 1300 n. 3 (9th Cir.1983), we consider whether there were extraordinary circumstances, *Jett*, 578 F.2d at 845, present requiring injunctive relief. We concluded that no extraordinary circumstances are suggested in the record, as indicated in our discussion in Part V. Because we hold that injunctive relief would not be appropriate, we need not determine whether, as Olagues and the organizations claim, an action for such relief may lie against federal officials under the Act itself.

Other courts have been equally reluctant to intrude into the sphere of prosecutorial authority. *See Reporters Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C.Cir.1978) ("Only the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations."), *cert.*

denied, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979) (*Reporters Committee*); *LaRouche v. Webster,* 566 F.Supp. 415, 417 (S.D.N.Y.1983) ("party seeking to enjoin a criminal investigation bears an almost insurmountable burden") (*LaRouche*); *accord In re Grand Jury of the Southern District of Alabama*, 508 F.Supp. 1210, 1214 (S.D.Ala.1980); *In re Grand Jury Subpoena to Central States*, 225 F.Supp. 923, 925 (N.D.Ill.1964).

Only one court has actually found the presence of sufficiently extraordinarily circumstances. In *Pollard v. Roberts*, 283 F.Supp. 248 (E.D.Ark.), *aff'd*, 393 U.S. 14 89 S.Ct. 47, 21 L.Ed.2d 14 (1968) (per curiam), the district court enjoined the enforcement of a subpoena requiring the disclosure of contributions to a political party. Such disclosure of what was then considered confidential data would have resulted in immediate, irreparable harm to the plaintiffs' clear first amendment interests. As a result, the court placed a minimal burden on the prosecutor to show that the subpoena was rationally related to a legitimate investigation, 283 F.Supp. at 256, a burden that he failed to meet. *Id.* at 257.

Courts have rejected attempts to interfere with an investigation by a United States Attorney in two similar instances. In *LaRouche*, contributors and organizations supporting a Congressman sued for injunctive and declaratory relief in regard to an investigation into his campaign. The investigation was triggered by a series of newspaper stories indicating potentially illegal campaign financing activities. Plaintiffs argued that the investigation was in bad faith with the intention of both chilling the plaintiffs' exercise of their first amendment rights of association and discouraging future contributions. The United States Attorney's activities had been limited to questioning various contributors. After noting the "almost insurmountable burden" plaintiffs faced, the district court emphasized that: "The decision to investigate, like the de-

cision to prosecute, is one which the Constitution places in the executive branch. The constitutional separation of powers prevents the courts from interfering with the exercise of prosecutorial discretion except under the rarest of circumstances." 566 F.Supp. at 417. That court limited its review to a determination of whether there was "reasonable cause to believe that criminal activity may have taken place." *Id.* at 418. Beyond that, the court held that it was not its function to examine the "wisdom" or "motives" behind the decision to investigate. *Id.* In denying all of plaintiff's claims for relief, the court found that the mere "*possibility* of criminal activity" as alleged in the newspaper articles was "sufficient to justify a criminal investigation." *Id.* Because the plaintiff made no showing of future investigatory misconduct, an injunction with respect to future investigations was also denied. *Id.* at 419. As to the fear that first amendment rights were being chilled, the court emphasized that the "compelling governmental interest in investigating possible" crime overrode such interests and that "the mere asking of material questions does not constitute a First Amendment violation." *Id.* at 418. *See also Jones v. Unknown Agents of the Federal Election Commission,* 613 F.2d 864, 877-78 (D.C.Cir.1979) (reasonable questioning by Commission agents about campaign contributions does not chill first amendment rights), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980).

Reporters Committee involved two newspapers which sought injunctive and declaratory relief from a telephone company policy of providing toll call records to law enforcement officials, claiming first and fourth amendment violations. The court held that the first amendment provided no additional "shield" respecting privacy interests beyond the fourth amendment's protection in the context of a good faith criminal investigation. 593 F.2d at 1054-55, 1058. The court emphasized the "particularly

heavy burden" on plaintiffs demanding equitable relief in such circumstances dictated by separation of powers concerns, *id.* at 1065, and that mere speculation as to irreparable harm would not suffice. *Id.* at 1067. In order to meet the burden plaintiffs would have to establish "a *clear and imminent* threat of future [prosecutorial] misconduct." *Id.* at 1071.

V

Plaintiffs urge that the preliminary investigation in this case should be reviewed by this court with "heightened scrutiny" because it focused on a "suspect class" and because a fundamental right is burdened. We disagree.

Initially, the organizations argue that a classification based on an individual's choice of language is a form of discrimination based on race or national origin. No court has yet held that a language-based classification is the equivalent of one based on race or national origin requiring heightened scrutiny as a "suspect class." Indeed, those courts which have faced this issue have held that language-based classifications are not the equivalent of national origin classifications. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir.1975); *see also Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir.1980) ("Neither [Title VII] nor common understanding equates national origin with the language one chooses to speak."), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). We agree with these courts and hold that a language-based classification is not the equivalent of a national origin classification, and does not denote a suspect class.

Unlike race, place of birth, or sex, language is not one of those "immutable characteristic[s] determined solely by the accident of birth" which typically are the basis for finding a suspect class. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). Although our first choice of language may be initially de-

termined to some extent "by the accident of birth," *id.*, we remain free thereafter to choose another should we decide to undertake the initiative. Indeed, bilingualism or multilingualism is hardly an extreme rarity today, as Olagues's own bilingualism exemplifies. Moreover, even if a significant percentage of those speaking a particular language can be shown to be of one "discrete and insular" racial or ethnic minority, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938), not all persons speaking that language would be so situated. The court would thus face the problem of blurred lines defining those persons entitled to heightened protection from use of the challenged classification, with the possibility of overbroad protection leading to the striking down of otherwise rationally based official action. The organizations' request therefore urges us "to extend its most exacting scrutiny to review [government action] that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor" of language. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973). We agree that within a society "of multitudinous origins, customs, tongues, beliefs, and cultures, . . . [i]t would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Sugarman v. Dougall*, 413 U.S. 634, 657, 93 S.Ct. 2842, 2865, 37 L.Ed.2d 853 (1973) (Rehnquist, J., dissenting), We therefore decline to equate one's choice of language with one's race or national origin, classification on the basis of which would require exacting scrutiny.

Heightened scrutiny is also appropriate if a fundamental right is burdened, and voting is considered a fundamental right. *E.g., Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972). It is difficult to see how any "burden" was placed on anyone's right to vote, however, since no individual citizen was

was denied his right to vote. Russoniello's preliminary inquiry was aimed at ferreting out potential voting fraud, in order to enchance the right to vote of those who qualified. Individual citizens who were initially identified as not qualified thereafter were only the subject of narrowly confined, noncoercive follow-up interviews probing potentially unlawful activities of others. Even if we construe this as a "burden," it is a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct.

The organizations' first amendment claims are equally lacking in substance. Whatever incidental burden (if any) on their associational rights which may have occurred must give way to the government's need to ensure the sanctity of the polls. *See, e.g., LaRouche,* 566 F. Supp. at 418 ("associational rights . . . [often] must give way to compelling governmental interests in investigating possible criminal activity"). Investigative activity inherently "affects or 'implicates' First Amendment activity." *Reporters Committee,* 593 F.2d at 1059 (emphasis omitted). The review of public records cannot involve any violation of first amendments rights. Moreover, the follow-up questioning of potential witnesses also is lawful. *See, e.g., Jones v. Unknown Agents of the Federal Election Commission,* 613 F.2d 864, 877-78 (D.C. Cir. 1979) (upholding questioning of campaign contributors regarding illegal contributions), *cert. denied,* 444 U.S. 1074, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980); *LaRouche,* 566 F. Supp. at 418 ("As long as reasonable cause to investigate exists, the mere asking of material questions does not constitute a First Amendment violation.")

When no "suspect class" is involved and no fundamental right is burdened, a rational basis test is used to determine the legitimacy of the classification. *See Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 311-12, 96

S.Ct. 2562, 2565-66, 49 L.Ed.2d 520 (1976) (per curiam). Here, the scope of the investigation was limited to recently-registered foreign-born voters seeking bilingual ballots. The impetus for the investigation was a study indicating problems with persons whose primary language was other than English, in part because of mistranslations in the Spanish language applications. The initial review was randomly based among this group in order to readily obtain some indication of the scope of any impropriety. When no significant level of impropriety was noticed, the investigation was terminated. Thus, it appears to have been reasonably limited in both its scope and its use of classifications.

We realize that the separation of powers doctrine does not require us to ignore any and all activities by executive officials regardless of whether their actions constitute clear violations of individual rights. At the same time, however, even the organizations recognize that a United States Attorney is entitled, indeed required, to conduct an investigation into allegations of voting fraud. They only quarrel with the scope and manner of the investigation subsequently undertaken. But ours is not the role of a "super prosecutor" empowered to monitor all prosecutorial activities on a day-to-day basis, absent compelling, extraordinary circumstances. *Chanen,* 549 F.2d at 1312-13.

We only hold that on the facts of this case, no such extraordinary circumstances exist warranting intrusion into the actions of the executive branch. This is not to say that the organizations' charges are not serious; we reach this conclusion only after careful scrutiny of the record before us. We are compelled, however, to refrain from injecting ourselves into the midst of what essentially was only an embryo of an investigation. A narrowly focused preliminary inquiry using public records was undertaken in order for the United States Attorney to determine

whether a problem even existed. Without the ability to make such a narrow inquiry, in the face of a study indicating potentially significant voter registration problems, the United States Attorney would be deprived of the information he needs to perform his duties. The organizations would have us either forbid any preliminary investigation, or mandate one of significantly broader scope. But matters such as the scope of a preliminary investigation are delegated to the sound discretion of the executive branch.

VI

The organizations also sought declaratory relief. The district court dismissed this claim without elaborating its reasons. The decision whether to grant declaratory relief is within the sound discretion of the district court. *See, e.g., Doe v. Gallinot,* 657 F.2d 1017, 1024-25 (9th Cir. 1981).

Declaratory relief may be appropriate even when injunctive relief is not. *See Steffel v. Thompson,* 415 U.S. 452, 469, 94 S.Ct. 1209, 1220, 39 L.Ed.2d 505 (1974) (*Steffel*). There is a considerable difference between *ordering* a government official to conduct his activities in a certain manner, and simply *pronouncing* that his conduct is unlawful and *should* be corrected. Nevertheless, there remains the concern that an award of declaratory relief in favor of the organizations could later provide grounds for seeking injunctive relief against the same officials should the organizations believe they are again the targets of a similar investigation, *see Samuels v. Mackell,* 401 U.S. 66, 72, 91 S.Ct. 764, 767, 27 L.Ed.2d 688 (1971) (*Samuels*), even though the investigative techniques may not be identical. Therefore, if declaratory relief based on a lesser showing leads to an injunction, the distinction between the two types of relief would be lost, despite the strong policy disfavoring such disruptive relief which we previously outlined. *See Steffel,* 415 U.S. at 481-82 & n. 3, 94 S.Ct. at

1226-27 & n. 3 (Rehnquist, J., concurring) (expressing concern over potential use of declaratory relief as a bootstrap).

Thus, the Supreme Court has recognized that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of" law enforcement activities as an injunction, *Samuels,* 401 U.S. at 72, 91 S.Ct. at 767, and therefore " 'the practical effect of [injunctive and declaratory] relief will be virtually identical.' " *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975), *quoting Samuels,* 401 U.S. at 73, 91 S.Ct. at 768. Notwithstanding the difference in effect between injunctive and declaratory relief, we conclude that the same general equitable principles should apply here in determining whether to grant declaratory relief as to the lawfulness of Russoniello's investigation. *See Samuels,* 401 U.S. at 73, 91 S.Ct. at 768.

The central purpose of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, is to provide parties with a declaration of their rights prior to incurring actual injury. In the typical case requesting declaratory relief with respect to law enforcement officials, a declaration of rights is sought with respect to a party's ongoing or intended conduct in light of existing criminal statutes. The party desires a declaration that his conduct is lawful, and therefore may not be interfered with by state or federal officials. *See Steffel,* 415 U.S. at 478, 94 S.Ct. at 1225 (Rehnquist, J., concurring). Declaratory relief thus provides an "alternative to pursuit of the arguably illegal activity." *Id.* at 480, 94 S.Ct. at 1226. Here, however, there is no claim seeking a declaration that the organizations' voter registration activities are lawful. Rather, they seek a declaration that the government's activities are unlawful. Thus, the organizations are not seeking any alternative to being forced to continue arguably lawful conduct with the

fear of imminent criminal prosecution. *E.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

In these circumstances, we hold that the district court's denial of declaratory relief was not an abuse of discretion. The organizations were not generally hindered from pursuing their lawful voter registration activities at the risk of imminent criminal prosecution, unlike the restaurant owners in *Doran*. Declaratory relief in this action would raise the same concerns regarding interference with the activities of prosecuting officials that we pointed out in our discussion of injunctive relief.

VII

The separation of powers concerns with regard to equitable relief against a United States Attorney are absent when examining the appropriateness of equitable relief against the county officials. But similar considerations of restraint in ordering such relief arise out of principles of comity and federalism, as emphasized in *Lyons, O'Shea,* and *Younger*. "[R]ecognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws. . . ." *Lyons,* 461 U.S. at 112, 103 S.Ct. at 1670, *citing O'Shea,* 414 U.S. at 499, 94 S.Ct. at 677, *and Younger,* 401 U.S. at 46, 91 S.Ct. at 751. "[N]ormal principles of equity, comity, and federalism . . . should inform the judgment of federal courts when asked to oversee state law enforcement authorities." *Lyons,* 461 U.S. at 112, 103 S.Ct. at 1670. Here, the actions of the county officials of which the organizations complain were all performed at the *specific request* of the United States Attorney. Enjoining the county officials' activities would thus, to some effect, enjoin the United States Attorney from pursuing his investigation. Because we find no basis

for interfering with the United States Attorney's investigation, we find no basis for equitable relief concerning the means he has to conduct it. *Cf. Gravel v United States,* 408 U.S. 606, 621, 92 S.Ct. 2614, 2625, 33 L.Ed.2d 583 (1972) (committee counsel gathering information for congressman is entitled to invoke congressional immunity).

Even absent these concerns, the organizations' claims under the Voting Rights Act against these officials do not appear to have merit. Assuming that the search of voting records intimidated bilingual voters, such intimidation would satisfy only one part of a two-pronged test for violations of 42 U.S.C. §§ 1971(b) and 1973i(b): the voters and organizations were intimidated, but the officials did not *intend* to intimidate. *See United States v. McLeod,* 385 F.2d 734, 740-41 (5th Cir. 1967). As we discuss in Part IX, the officials acted in good faith. Although a declaratory judgment for violation of 42 U.S.C. § 1973aa-1a could not be denied on the basis of intent, *see Chinese for Affirmative Action,* 580 F.2d at 1008-09 (good faith is no defense to equitable relief regarding bilingual ballot provisions), there has been no violation of this section, which concerns solely the provision of bilingual ballots. There has been no allegation that bilingual ballots have not been provided in accordance with that section.

VIII

The organizations' First Amended Complaint seeks "statutory damages" under the Voting Rights Act. Pursuant to *Allen v. State Board of Elections,* 393 U.S. 544, 555, 89 S.Ct. 817, 826, 22 L.Ed.2d 1 (1969), private litigants are held to have an action against state officials for declaratory and injunctive relief under section 5 of the Act, 42 U.S.C. § 1973c.

The Act, however, does not specify any statutory damage remedies. No case has been cited nor have we found one in which damages were recovered. In deter-

mining whether to construe an implied cause of action, the principal focus must be on congressional intent. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 377, 102 S.Ct. 1825, 1838, 72 L.Ed.2d 182 (1982). The Act itself limits the recovery of any fine for criminal sanctions to $5,000. *See* 42 U.S.C. *8* [*sic*] 1973aa-3. The legislative history nowhere suggests any action for damages, but instead observes that a private litigant is entitled to "the same remedy" as the Attorney General, as well as attorneys' fees as in 42 U.S.C. §§ 1981-1988. S.Rep. No. 295, 94th Cong., 1st Sess. 39-43, *reprinted in* 1975 U.S. Code Cong. & Ad.News 774, 806-10. That history points out that "[t]he sole consequence" of the provision for a private cause of action under the Act "is to broaden the scope of *equitable* relief which may be requested" to include the "special remedies" specified in the Act. *Id.* at 49, *reprinted in* 1975 U.S. Code Cong. & Ad.News at 816 (emphasis added).

Moreover, Supreme Court precedent suggests that private plaintiffs are limited to damage actions under 42 U.S.C. § 1983. *See Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed.2d 987 (1944). In *Smith,* plaintiffs were awarded damages for violation of their voting rights under 8 U.S.C. § 31 (now echoed in 42 U.S.C. § 1973), in a suit under 8 U.S.C. § 43 (now codified at 42 U.S.C. § 1983). Equitable relief suffices to fulfill the purpose of the statute, which is to ensure the right to register and vote at the poll. See, *e.g., Webber v. White,* 422 F. Supp. 416, 426 (N.D. Tex. 1976) ("the most relief that a federal district court can grant to a private litigant under the *Allen* interpretation of 42 U.S.C. §1973c" is declaratory and injunctive relief). We decline to imply any action for damages.

IX

There is also an issue of whether the organizations' complaint can be read fairly to include a request for damages based on constitutional claims or statutory claims such as

section 1983, 42 U.S.C. § 1983. We agree with the district court, however, that the officials involved in this action would be entitled to immunity from such damage claims.

Under *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), state prosecutors are absolutely immune from damage suits with respect to their quasi-judicial activities. Federal prosecutors receive the same protection. *Butz v. Economou,* 438 U.S. 478, 516-17, 98 S.Ct. 2894, 2915-16, 57 L.Ed.2d 895 (1978). Other executive officials are entitled to qualified immunity, *see. e.g., Scheuer v. Rhodes,* 416 U.S. 232, 247-49, 94 S.Ct. 1683, 1691-92, 40 L.Ed.2d 90 (1974) (state executive officials), as are prosecutorial activities that are merely administrative or investigative. *Jacobson v. Rose,* 592 F.2d 515, 524 (9th Cir. 1978), *cert. denied,* 442 U.S. 930, 99 S.Ct. 2861, 61 L.Ed.2d 298 (1979).

We have previously employed *Imbler's* functional approach for determining the degree of immunity for prosecutorial activity. *See Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675, 678 (9th Cir. 1984). Quasi-judicial activities are not limited to post-indictment matters, but also include "[i]nvestigative functions carried out pursuant to the preparation of a prosecutor's case." *Freeman on Behalf of the Sanctuary v. Hittle,* 708 F.2d 442, 443 (9th Cir. 1983) (per curiam). See also *Atkins v. Lanning,* 556 F.2d 485, 488-89 (10th Cir. 1977) (per curiam).

The district court held that the actions in question were investigatory rather than prosecutorial in nature. The limited investigative activities undertaken by Russoniello, however, may be encompassed within those activities essential to the initiation of a prosecution. His decision to request a sampling of voting records can hardly be described

as a purely administrative act. The Third Circuit has highlighted this aspect of a prosecutor's duties:

> We recognize that the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make the decision would only foster uninformed decisionmaking and the potential for needless actions. We believe the right to make the decision without being subject to suit must include some limited right to gather necessary information.

Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979), *cert. denied,* 453 U.S. 913, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1981).

We need not determine whether the district court erred in denying absolute immunity, because we agree that all those sued are entitled at least to qualified, good faith immunity. The controlling standard is "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738,73 L.Ed.2d 396 (1982). Moreover, summary judgment is encouraged as an appropriate tool to "avoid excessive disruption of government." *Id.*

Under this objective standard, all the officials are entitled to immunity. The county officials did no more than submit information in the public record to the United States Attorney at his request, with some later, voluntary interviews of those voters whose citizenship the INS was unable to ascertain. Such actions do not violate any "clearly established" rights. Examining information in the public record violates no one's rights. The Northern District

Director of the INS, David Ilchert, similarly did no more than provide information to Russoniello that was available to anyone on request.

Russoniello's actions were limited to conducting a preliminary investigation of potential voting fraud by examining and cross-checking public records. The limited scope of the investigation was reasonably related to his need to secure a preliminary indication of the scope of potential illegalities. No further activities were undertaken or contemplated. These actions also violated no individual's "clearly established" rights; indeed, it was Russoniello's duty to perform this investigation under the Voting Rights Act.

The organizations' claims rest entirely on their contention that an investigation using a language-based classification to define its scope is subject to strict scrutiny as invidious discrimination on the basis of national origin. This contention is further dependent upon a finding that the illegality of using such a classification was "clearly established." *See Capoeman v. Reed,* 754 F.2d 1512, 1514 (9th Cir. 1985) (establishing framework for determining whether a right was clearly established for purposes of qualified immunity). We already have concluded that such a classification does not call for strict scrutiny. But even if it did, the illegality of such a classification was not "clearly established." The district court's order finding qualified immunity for all federal and state officials sued is therefore affirmed.

AFFIRMED.

NELSON, Circuit Judge, concurring and dissenting:

I agree that the controversy is not moot (section II), that the organizations have standing (section III), and that the defendants are entitled to good faith immunity from damages under 42 U.S.C. § 1983 (section IX). I dissent from the holdings that Olagues lacks standing (part of section III), that "extraordinary circumstances" are required

to enjoin an investigation that infringes upon First Amendment rights (section IV), that heightened scrutiny is not warranted for the equal protection claim (section V), that declaratory and injunctive relief should be judged under the same standards (section VI), and that the plaintiffs have no claims under the Voting Rights Act (sections VII and VIII). I would remand on the injunction and one Voting Rights Act claim, and reverse the denial of a declaratory judgment which provides that the investigation violated the Equal Protection Clause. For clarity and brevity, I will limit my comments on this complex case to these issues.

Standing should not be denied to Olagues. Neither rationale employed by the majority is convincing. The prudential analysis speaks of "equitable relief" but then considers solely the request for an injunction, ignoring the declaratory relief sought. The majority concedes that Olagues has alleged an injury, but then categorizes the harm as "subjective" and therefore nonjusticiable under *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Yet *Laird* recognizes that when the complainant is subject to the challenged exercise of government power, whereby the government improperly imposed an affirmative obligation likely to have a deterrent effect on the exercise of his rights, *Lamont v. Postmaster General*, 381 U.S. 301, 308, 85 S.Ct. 1493, 1497, 14 L.Ed.2d 398 (1965), the requirements of standing are met. *Laird*, 408 U.S. at 11-13, 92 S.Ct. at 2324-25 (citing *Lamont*).

Olagues satisfies the requisites of standing under the very case upon which the majority relies. *See McMichael v. County of Napa*, 709 F.2d 1268, 1269-70 (9th Cir.1983). The burden which Olagues alleges upon his exercise of the franchise—that his request for a bilingual ballot triggered an investigation of him by the INS, the FBI, and the United States Attorney, and an interview with the local District Attorney at which he was to prove his citizen-

ship—is concrete. He has a personal stake in the controversy and the relief requested would prevent the injury from recurring. Moreover, the majority's suggestion that any stigma attributable to the government's action was Olagues' own fault, because all publicity concerning the investigation resulted from the filing of this lawsuit, has neither legal support nor a factual basis in the record.

The majority accords standing to the organizations because the investigation threatened their members. The identical threat is posed to the group of voters to which Olagues belongs—Hispanic citizens who request bilingual ballots. This language minority group is explicitly protected against voting discimination. *See* 42 U.S.C. § 1973b(f)(2). The injury to Olagues as a member of this group is another ground for his standing under the Equal Protection Clause. *See United Jewish Organizations of Williamsburgh, Inc. v. Wilson*, 510 F.2d 512, 522 (2d Cir.1975).

The majority misstates the standard for injunctive relief in this context. Instead of the "extraordinary circumstances" threshold, drawn from federalism and criminal cases,[1] this investigation should have been enjoined if it lacked a reasonable basis or was initiated in bad faith. *See*

---

[1] See *Rizzo v. Goode*, 423 U.S. 362, 379, 96 S.Ct. 598, 608, 46 L.Ed.2d 561 (1976) (federalism issues in injunction of municipal police); *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978) (no immediate controversy on discovery until prosecution had commenced); *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.) (prosecutor's choice of evidence to present to grand jury), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc) (United States Attorney arrested for contempt for refusing to sign a grand jury indictment), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed. 2d 700 (1965); *In re Grand Jury of the Southern District of Alabama*, 508 F.Supp. 1210, 1214 (S.D.Ala. 1980) (prosecutorial vindictiveness); *In re Grand Jury Subpoena to Central States*, 225 F.Supp. 923, 925 (N.D. Ill. 1964) (motion to quash grand jury subpoenas).

Branzburg v. Hayes, 408 U.S. 665, 699-701, 707-08, 92 S.Ct. 2646, 2665-2666, 2669-2670, 33 L.Ed.2d 626 (1972); *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1064 (D.C.Cir.1978), *cert. denied*, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979); *Pollard v. Roberts*, 283 F.Supp. 248, 256-58 (E.D.Ark.), *aff'd*, 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d 14 (1968) (*per curiam*). The First Amendment protects citizens from investigations which do not meet this "reasonable basis" standard. *Pollard*, 283 F.Supp. at 258; *Reporters Committee*, 593 F.2d at 1064. *See also Branzburg v. Hayes*, 408 U.S. 665, 699-01, 707-08, 92 S.Ct. 2646, 2665-66, 2669-70, 33 L.Ed.2d 626 (1972).

The organizations alleged that the United States Attorney lacked a reasonable basis for initiating the investigations. The district court should have made a finding on this issue. *See La Rouche v. Webster,* 566 F. Supp. 415, 418 (S.D.N.Y. 1983); *Pollard,* 283 F. Supp. at 258. The relief sought by the organizations was not anticipatory, since the investigation presented a current case or controversy. *Cf. Jett v. Castaneda,* 578 F.2d 842, 845 (9th Cir. 1978) (no case or controversy); *Reporters Committee,* 593 F.2d at 1065. The denial of the preliminary injunction should be affirmed, therefore, only if the organizations failed to show that the investigation was not reasonable or initiated in bad faith. The question should be remanded.

Contrary to the majority's view, declaratory relief raises different concerns than an injunction. To quote one case cited by the majority, "critical distinctions make declaratory relief appropriate where injunctive relief would not be." *Steffel v. Thompson,* 415 U.S. 452, 481, 94 S.Ct. 1209, 1226, 39 L.Ed.2d 505 (1974) (Rehnquist, J., concurring). The majority echoes the mistake of the panel which was reversed in *Steffel* for holding that a failure to demonstrate irreparable injury precluded the granting of declaratory relief. *Id.* at 471-72, 94 S.Ct. at 1221-22. It

reasons that where injunctive relief is inappropriate, declaratory relief should also be denied, because "an award of declaratory relief in favor of the organizations could later provide grounds for seeking injunctive relief against the same officials should the organizations believe they are again the targets of a similar investigation." This concern in misplaced, because an injunction *should* issue if the government so flouts a judgment declaring certain action unconstitutional. Declaratory relief is a separate remedy to be awarded when warranted, even if an injunction under the same circumstances would be denied. *Steffel,* 415 U.S. at 471-72, 94 S.Ct. at 1221-22.

This case warrants the award of a declaratory judgment under the Constitution. The investigation fails before the scrutiny required for a classification which burdens the voting rights of a suspect class.

The majority recognizes that the investigation targeted "recently registered, foreign-born voters who requested bilingual ballots," at ____, but then analyzes the class as if it were defined solely by language ability. The classification was of those who requested bilingual ballots, not just of individuals who speak more than one language, and it included two other factors—foreign birth and recent registration to vote. The class should be analyzed as defined by these *three* characteristics.

Foreign birth is "an immutable characteristic determined solely by an accident of birth," *Frontiero v. Richardson,* 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973), and is similar to a national origin classification. Together with the requirement of recent registration, the target class appears composed of immigrants who have recently obtained United States citizenship but prefer Spanish or Chinese-language ballots. Like the class of Hispanics in *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), these characteristics taken together define a suspect class. The investigation

by the FBI and INS, together with the interviews requiring proof of citizenship, amount to "different treatment" of these citizens. Such additional requirements imposed on voters "solely because of their ancestry are by their very nature odious to a free people." *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943).

The fundamental right to vote was burdened by this investigation. The majority finds otherwise, perhaps because it equates "burden" with outright denial of the right to vote. Precedent does not define "burden" so narrowly, however. *See, e.g., Harper v. Virginia Board of Elections,* 383 U.S. 663, 666-67, 86 S.Ct. 1079. 1081, 16 L.Ed.2d 169 (1966) (poll tax constitutes burden). Nor is "denial" of the right to vote the only behavior prohibited under the Voting Rights Act. *See* 42 U.S.C. § 1973 ("no voting qualification or prerequisite to voting, or standard, practice, or procedure . . . to deny or abridge . . ."); 42 U.S.C. § 1973i(b) ("intimidate, threaten, or coerce").

The opinion states that "it is difficult to see how any 'burden' was placed," but I do not share this difficulty. An investigation by the FBI and INS and a summons to the district attorney to prove one's citizenship, as I noted above concerning the injury to Olagues, constitutes a burden on the exercise of the right to vote *in this case.* The impact of the investigation of the class went beyond any ordinary inconvenience caused to witnesses. These individuals are not fluent in English, are new to this country, and through their recent acquisition of citizenship have experienced the INS bureaucracy, which misrepresented the citizenship status of more than half of those investigated. When a citizen's request for a bilingual ballot—which is specifically made available by Congress to eliminate voting discrimination against those more comfortable in another language, *Chinese for Affirmative Action v. Lequennec,* 580 F.2d 1006, 1008 (9th Cir. 1978), *cert.*

denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979)—triggers such consequences, a burden has been imposed. The Voting Rights Act forbids intimidation of voters, and in my view this investigation intimidated those foreign-born, recently registered voters who requested bilingual ballots.

Having examined the character of the classification in question and the importance of the individual interests at stake, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979), we examine the interests asserted in support of the classification. *Id.* The classification must be necessary to serve a compelling interest, and it must employ the least drastic means to achieve that end. *Id.* at 184-85, 99 S.Ct. at 990. This investigation cannot withstand such scrutiny. It was not narrowly tailored to catch those wrongly registered, because it targeted recently registered citizens, who are required by law to be literate in English. It assumed that individuals who speak Spanish or Chinese are likely not to be citizens, though the statistical predominance of Spanish—and Chinese-speaking citizens is the very reason why provision of bilingual ballots was required under federal law. The investigation was unconstitutional under the Equal Protection Clause, and a declaratory judgment should be granted.

Relief may also be required under the Voting Rights Act. I would remand the issue of potential violation of 42 U.S.C. § 1973aa-1a. *See Lequennec*, 580 F.2d at 1008-09. Good faith is not a defense under this provision, which does not require intent to discriminate. *Id.*

Finally, even absent its legal infirmities, this investigation violated the spirit behind the Voting Rights Act, which charges the Attorney General with eradicating discrimination against language minority voters and discrimination based upon national origin. Instead, this U.S. Attorney's efforts *engendered* such discrimination. I cannot join the majority's wholesale affirmance of the district court's judgment.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 2102 SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS

[Filed Sept. 14, 1983]

ORDER

IT IS HEREBY ORDERED THAT:

1) Plaintiffs' motion to amend is DENIED;

2) Plaintiffs' motion concerning Section 5 of the Voting Rights Act is DENIED;

3) Defendants' motions for summary judgment are GRANTED. Judgment shall be entered for all defendants.

Date: SEP 12, 1983

/s/ SPENCER WILLIAMS

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 2102 SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS

[Filed Sept. 14, 1983]

JUDGMENT

IT IS HEREBY ORDERED that judgment shall be entered in the above-captioned matter for defendants.

Date: SEP 12, 1983

/s/ SPENCER WILLIAMS
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 2102 SW

JOSE J. OLAGUES ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS

[Filed Sept. 14, 1983]

MEMORANDUM IN SUPPORT OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The basic facts of this case are not in dispute. Plaintiffs, individuals and groups alike, claim that a recently completed voting fraud investigation conducted by the United States Attorney's Office and the other named defendants violated their civil rights.

Defendant Joseph Russoniello, the United States Attorney for the Northern District of California, initiated the investigation on April 19, 1982 in a letter sent to the district attorneys of nine northern California counties. In the letter, Mr. Russoniello expressed concern over a study conducted by the Santa Clara County District Attorney's Office which indicated that a substantial percentage of recently registered foreign-born individuals were not United States citizens. The study found that all of those improperly registered believed that they were eligible to vote either because they were married to United States citizens or had lived in this country for a lengthy period of

time. Based on this information, Mr. Russoniello expressed concern that certain persons or organizations may have illegally registered these individuals or conspired to registered them in violation of 42 U.S.C. § 1973i(c)(d). He also expressed the opinion that the source of the problem could be the fact that many of those who had registered improperly did not speak English and were thus more susceptible to being misled by improper representations concerning voter eligibility.[1]

Mr. Russoniello expressed further concern that if the illegal registration of non-citizens was widespread, the upcoming June 8th general elections could be subjected to court challenge. While it was too early, in Mr. Russoniello's opinion, to "sound any alarm," he did state that the need existed for a mutual effort to determine the extent of the problem, if in fact one existed at all. Accordingly, he requested the cooperation of local law enforcement officers and voter registrars in obtaining a random sampling of recently registered foreign-born individuals. Since Mr. Russoniello was of the opinion that the problem of illegal registration would arise, if at all, among those who did not understand English, he asked the counties to submit the names and dates of birth of twenty-five newly registered persons whose affidavits of registration reflected (1) a foreign country as the place of birth and

---

[1] Shortly after sending this first letter, Mr. Russoniello was told that the registration form's Spanish language admonition concerning citizenship did not accurately translate the English language admonition that a person "must" be a citizen to be able to vote. According to the information given Mr. Russoniello, the Spanish language admonition merely states that a person "should" be a citizen. According to his affidavit, this information further confirmed Mr. Russoniello's suspicion that if irregularities in registration occurred, they would occur most frequently amongst those for whom English was, at best, a second language.

(2) a preference for election materials in a language other than English. After receipt of this sampling, according to the letter, the United States Attorney's Office would endeavor to determine the citizenship of each individual through the records of the Immigration and Naturalization Service (INS). If citizenship could not be determined from these records, the local officials would be asked to contact the individual to determine (1) citizenship and (2) if the individual was not a citizen, who registered him or her.

Mr. Russoniello made it clear in his letter that he had no intention of prosecuting any individual found ineligible to vote but would "seriously consider" prosecuting any individual who deliberately "conspired with another individual for the purpose of encouraging the giving of false information in order to establish the eligibility of any individual to register . . ."

All of the local district attorneys responded positively to the sample request, albeit in varying degrees. Of the names submitted, a total of 168 were subjected to a federal records check including an examination of FBI civil and criminal fingerprint indices, a manual check of the INS records in San Francisco, and a check of the INS central computer bank files in Washington, D.C. The examination disclosed that of the 168 persons, no records existed for 68 of the individuals, 55 were positively identified as citizens, and 45 were identified as not citizens or probably not citizens. Mr. Russoniello conveyed this information to the respective district attorneys along with a request that they conduct interviews of those not positively identified as United States citizens.

Apparently all of the district attorneys conducted these interviews. Some were done in person, others by letter. There is nothing in the record to indicate that these inter-

views rose to the level of an involuntary interrogation nor is there any evidence as to any individual being penalized in any way for refusing to cooperate.

Shortly after the investigation began, plaintiffs initiated suit, claiming the study interfered with their statutorily protected right to participate in the electoral process; discriminated against them on the basis of race and national origin; and deterred the exercise of their First Amendment right to freedom of association. Plaintiffs are Hispanic-American and Chinese-American citizens and organizations who sought to represent a class of similarly situated groups and organizations. Both federal and county officials are named as defendants in the suit, including Mr. Russoniello and David Ilchert, the District Director for the INS.

On May 24, 1982, the court granted the federal defendants' motion to dismiss the injunctive aspects of the suit on the ground that it had no authority to enjoin or otherwise control an ongoing investigation of the United States Attorney's Office. At the same time, the federal defendants' motion to dismiss the compensatory aspects of the suit based on a theory of absolute immunity was denied.

On September 24, 1982, the federal defendants filed a motion for summary judgment as to the remaining claims. The local defendants filed a similar motion on November 3, 1982. Plaintiff filed a countermotion for partial summary judgment on November 30, 1982. On December 15, 1982, at the close of oral argument on all motions, the court granted defendants' motions and dismissed the entire action. The remainder of this memorandum addresses, briefly, the court's reasoning as to one ground for dismissal raised by the defendants—qualified immunity.

II.

Prosecutors enjoy total immunity for acts of initiating or pursuing a criminal prosecution. *Imbler v. Pachtmann,*

424 U.S. 409, 420 (1976). A prosecutor engaged in purely investigatory or administrative activities, however, is entitled only to the qualified "good faith" immunity afforded all public officials. *Jacobson v. Rose*, 592 F.2d 515, 525 (9th Cir. 1978). This court has already determined that the conduct in this case was investigatory, not prosecutorial, in nature. The question, then, is whether the United States Attorney, as well as the remainder of the defendants, is entitled to the protection of the good faith defense.

In the recent case of *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the Supreme Court clarified the scope of the qualified immunity defense. Prior decisions of the Court had stated that the defense included both subjective and objective elements. Thus, in order to establish liability, a plaintiff needed to show only that the official (1) knew or reasonably should have known that the action taken within his sphere of official responsibility would violate the constitutional rights of the plaintiff (objective) or (2) undertook "the action with malicious intention to cause a deprivation of constitutional rights or other injury . . . ." (subjective), *Wood v. Strickland*, 420 U.S. 308, 322 (1975). If a plaintiff could show either course of conduct, the public official would not be entitled to immunity from damages. The Court in *Harlow, supra*, concluded that the subjective aspect of the defense required the resolution of the public official's motives, an inquiry that too often proved to be disruptive to the government process:

> [I]t is now clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary

> functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government. Id. at 2734.

In an effort to strengthen the defense the *Harlow* Court established three related principles. First, rejecting the previously accepted objective/subjective approach, the Court stated that the inquiry into a particular official's conduct should be strictly objective; evidence of the official's actual state of mind should be considered only in those cases with "exceptional circumstances." *Id.* at 2732-33. By abolishing the subjective aspect of the good faith defense, the Supreme Court expressly encouraged the dismissal of government officials through motions for summary judgment. The Court specifically disapproved of those cases wherein summary judgment was denied because the trial court could not resolve the issue of the particular official's "permissible intentions:"

> The subjective element of the good faith defense frequently has proved incompatible with our admonition in *Butz* [*v. Economou*, 438 U.S. 478, 507-508] that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motion for summary judgment.

> And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury. *Id.* at 2732-33.

Accordingly, summary judgment may not be denied, as it may have been in the past, solely on the ground that there remains a triable issue of fact as to the official's subjective state of mind.

The second principle enunciated by the Court is that this objective standard requires the case to be dismissed unless it is shown that the official's conduct violated "clearly established law." *Id.*, at 2733. Finally, the Court encouraged the early grant of summary judgment by holding that "[u]ntil this threshold question is resolve, discovery should not be allowed." *Id.* at 2734.

All of the defendants acted within their official capacities when they participated in the subject investigation. Accordingly, all are entitled to at least assert the qualified immunity defense. What must be decided is whether any of defendants' acts, viewed separately or in combination, violated constitutional or statutory prohibitions which were clearly established at the time of the action.

Before addressing plaintiffs' various federal claims, three preliminary matters should be noted. First, it should be made clear that the individual plaintiffs represent only those *citizens*—both native and naturalized—who were or may be affected by the defendants' conduct. They clearly have no standing to assert the rights of any aliens involved in defendant's study.

Second, contrary to the allegations of plaintiffs, it appears that all of the information provided by the local defendants and the INS is a matter of public record, available to any party upon an appropriate request. Even if it were not publicly available, plaintiffs have not shown

that providing the United States Attorney with this kind of information, in the course of a criminal investigation, violates any clearly established state or federal law.

Third, as discussed, the investigation in question was aimed at determining whether a large number of alien residents were being induced to register under fraudulent misrepresentations. It is undisputed that preventing this kind of election fraud constitutes a formidable and compelling state interest. *Marston v. Lewis*, 410 U.S. 679 (1973); *Burns v. Forston*, 410 U.S. 686 (1973). This is true regardless of whether the fraud involves only isolated incidents of illegal registration or, as in this case, a possible conspiracy to illegally register a sizable number of noncitizens. Faced with evidence indicating the possibility of such a substantial impact on the integrity of the franchise, the United States Attorney has the right, if not the duty, to at least determine the scope of the actual problem and, if necessary, instigate required remedial action.

Of course, the United States Attorney does not have unfettered discretion over the manner in which such an investigation is conducted, at least insofar as he, or others, may be subjected to liability for damages resulting from the investigation. The core of plaintiffs' complaint lies not with the fact of such an investigation but with the defendants' chosen methodology. We therefore turn to these objections, keeping in mind the limitations imposed by *Harlow, supra*, and its predecessors.

III.

Plaintiffs claim that the subject investigation impinged upon their fundamental right to participate in the electoral process and discriminated against them on the basis of race or national origin—both suspect classifications—in violation of their equal protection rights.

In the recent case of *Plyer v. Doe*, 457 U.S. 202, 216-17 (1982), Justice Brennan, speaking for the majority of the court, made the following observations concerning the Equal Protection Clause of the Fourteenth Amendment:

> The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). But so to, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accomodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some relationship to a legitimate purpose.
>
> But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class," [footnote omitted] or that impinge upon the exercise of a "fundamental right" [footnote omitted]. With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that i[t]s classification has been precisely tailored to serve a compelling state interest.

The Fourteenth Amendment speaks only in terms of state action. The Fifth Amendment Due Process Clause, however, has been interpreted as imposing an equal protection limitation on federal conduct. *See, Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

As to the right to vote, plaintiffs concede that the prevention of election fraud presents a compelling state interest which may justify certain limitations on the right's exercise. *Burns v. Forston, supra; Marston v. Lewis, supra; Dunn v. Blumstein*, 405 U.S. 330 (1972). Plaintiffs argue however that these cases are inapplicable to the instant action since no election fraud or criminal violation of the election laws was ever uncovered. The Court has never held, however, that there must be actual fraud or even evidence of fraud. Instead, in the context of residency requirements, the Court has found that "[s]tates have valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral process from *possible* fraud (emphasis added)." *Marston, supra*, at 680.

In the instant action there was certainly, at a minimum, evidence of possible fraud. The Santa Clara study indicated that a substantial number of aliens who had recently registered were misinformed as to their eligibility to vote. Accordingly, the only question is whether the defendants' approach to this problem was "carefully tailored." For purposes of a qualified immunity analysis, the court finds that defendants have met this burden. The imminence of the upcoming election limited the number of corrective or prophylactic measures the defendants could implement. Moreover, the defendants did not proceed with a whole scale investigation of all foreign-born registrants. Instead, they chose to proceed with a limited study to determine the scope of the problem—if in fact one existed—and to determine what additional steps, if any, should be taken. Only a few hundred individuals had

their names checked by the INS. Even fewer were asked to provide additional information about their citizenship and then only after the government's own check proved inconclusive. If the individual had proof of citizenship, he or she was not asked who registered them to vote. As noted, the United States Attorney indicated that no individual found ineligible to vote would be prosecuted for registering. There is also no indication any of the local defendants intended to prosecute any of these individuals under state law. Finally, there is no evidence that any individual was denied the right to vote or otherwise penalized for merely refusing to cooperate with the survey. The degree of intrusiveness in the instant case contrasts sharply with the burden imposed by a residency requirement.

Accordingly, the court finds that defendants' actions did not violate any clearly established right held by either the individual or group plaintiffs to participate in the electoral process.

Plaintiffs also argue that strict scrutiny should be applied to defendants' conduct since they "admittedly" singled out racial groups as subjects of investigation. The basis for this contention is unclear. Mr. Russoniello did not specifically request a sampling of voter affidavits based on the affiants' racial or ethnic background; the request was limited to recently registered foreign-born individuals who requested bilingual voting information. It is not altogether clear that a language based classification, standing alone, is synon[y]mous with a racial or ethnic group classification. In a number of civil rights cases, a variety of courts have considered and rejected such a conclusion. *Vasquez v. McAllen & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (employer's English-speaking requirement did not violate Title VII or § 1981 as applied to a monolingual Hispanic employee); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (employer's "speak-only-English" rule did not violate Title

VII or § 1981 as applied to Hispanic employee); *See also, Guadalupe Org. Inc. v. Tempe Elementary School Dist. 3,* 587 F.2d 1022, 1026 n. 3 (9th Cir. 1978) (decision to provide or not provide bilingual education to children of Mexican-American and Yanqui Indian origin does not involve a classification based on a suspect class; the Equal Protection Clause neither requires nor prohibits a public school district from providing bilingual-bicultural education to Non-english speaking children).

In *Garcia, supra,* the court made the following observation:

> National origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage, *Espinoza v. Farah Manufacturing Co.,* 1973, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 or poverty, *Ybarra v. City of Los Altos,* 9 Cir. 1974, 503 F.2d 250, 253 or with activities not connected with national origin, such as labor agitation, *Balderas v. Las Casitas Farms, Inc.,* 5 Cir. 1974, 500 F.2d 195, 198. *Garcia, supra,* at 269.

In discussing basic concepts of equal protection considerations, the court noted that the highest level of scrutiny has been traditionally reserved for classifications which are based on immutable characteristics, such as sex, race or national origin. The court observed that:

> [t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might be an immutable trait like skin color, sex or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice. *Id.* at 270.

In *Vaquez, supra,* the court went even further, finding that an English only rule, by itself, was not illegally discriminatory even when applied to a former employee who could only speak Spanish.

Based on the foregoing, the court concludes that defendants did not violate any clearly established constitutional right merely by limiting their study to individuals who requested bilingual ballots. Even if it is assumed that defendants' study was based, at least in part, on national origin considerations, it is not apparent that a strict scrutiny analysis is required. Both the Supreme Court and the Ninth Circuit have considered the extent to which the government may inquire as to the citizenship of a group of people based wholly or in part on their apparent race or national origin. The issue has arisen in cases involving investigations of the INS and the border patrol aimed at identifying "illegal" aliens which, by their nature, invariably include investigating and questioning legal residents as well as illegal ones. The argument has been made to both courts that these investigations violated the Equal Protection Clause.[2] This argument, however, has been met with silence. Instead, these courts—along with virtually all others that have considered the matter—have limited their inquiry to determining whether the investigation violated the Fourth Amendment's prohibition on unreasonable "search and seizures." In contrast to a strict scrutiny analysis, a Fourth Amendment inquiry greatly reduces the burden placed on the governn ent. Instead of a compelling state interest, the government need only establish "probable cause" and then only if a search or seizure occurred. Accordingly, even though the standards differ drastically, this line of cases is certainly relevant to determining whether defendants violated clearly established constitutional prohibitions.

---

[2] See, e.g., Brief for Respondent at 53-54, United States v. Ortiz, 422 U.S. 891 (1975); Brief for Respondent at 46-55, United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Inter'l Ladies Garment Workers v. Sureck, 681 F.2d 624, 628 n. 7 (9th Cir. 1983)

For purposes of an arrest or a full scale custodial interrogation, the Supreme Court has held that an Hispanic appearance does not, by itself, constitute probable cause, regardless of whether the suspect is in or out of the border area. *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973) (roving patrol); *United States v. Ortiz,* 422 U.S. 891 (1975) (fixed checkpoint).

Probable cause, however, is not always required before the government may question an individual as to his citizenship or residency status. Most recently, the Ninth Circuit found that there was no seizure for Fourth Amendment purposes when INS agents approached a Hispanic appearing individual in an open field and proceeded to ask him questions. *Benitez v. I.N.S.,* ____ F.2d ____ (9th Cir. June 10, 1983). *Accord, Zepeda v. INS,* ____ F.2d ____ (9th Cir. June 16, 1983) ("neither questioning in general nor questioning about immigration status requires reasonable suspicion of alienage, for neither involves a seizure in violation of the fourth amendment."); *Cuevas-Ortega v. INS,* 588 F.2d 1274 (9th Cir. 1975) (voluntary questioning of suspected illegal alien in her home); *Cordon de Reano v. INS,* 554 F.2d 944 (9th Cir. 1977) (same). Benitez voluntarily offered to retrieve documents from his car which would show that he was a legal resident. As to the question of voluntariness, the court noted that there was "no evidence of the use of force, a display of a weapon, or the threatening presence of several officers."

In a series of recent cases, the Circuit has considered the constitutionality of the INS's practice of conducting "sweeps" of workplaces, factories, restaurants and other areas to find illegal aliens. Typically, in the case of a factory sweep, the procedure begins with the surveillance of a particular workplace. Once the decision is made to conduct a sweep, a number of INS agents enter the site and effectively "seal" all exits. Most, if not all workers are then

subjected "to at least a visual perusal by investigators, if not actual questioning. . . " *International Ladies Garment Workers' Union v. Sureck,* 681 F.2d 624, 630 (9th Cir. 1983) *cert. granted sub nom.,* ____ U.S. ____ 103 S.Ct. 1872 (1983).

Plaintiffs in *Sureck, supra,* – the ILGW union, two United States citizens and two resident aliens – sought "declaratory and injunctive relief from the INS' pattern and practice of conducting factories and workplaces sweeps for purposes of locating illegal aliens." *Id.,* at 626, The court found that "the execution of the factory surveys, while not rising to the level of an arrest requiring the general rule of probable cause, sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys." *Id.,* at 630.

Having determined that a seizure occurs during a factory sweep, the court next determined the appropriate constitutional standard to apply to the INS' conduct. After a thorough review of the applicable case law, the court concluded that:

> INS investigators may not seize or detain workers for citizenship status questioning unless the investigators are able to articulate objective facts providing investigators with a reasonable suspicion that each questioned person, so detained, is an alien illegally in this country. *Id.* at 638.

The court noted that the elements of illegality and specificity contained in the above standard are necessary, at least in part, to protect the Fourth Amendment rights of innocent workers.

Certainly, under this line of cases, defendants' action would be considered constitutional. There is no evidence that any of the individuals surveyed were involuntarily detained or interrogated. Even if a detention occurred, the

defendants had a "reasonable suspicion" that each individual had committed a crime, i.e. registered to vote without being eligible.

Plaintiffs have failed to cite a single case in which an INS citizenship investigation of this nature has been subjected to an equal protection analysis. This court has carefully reviewed the applicable case law and found, as noted *supra,* that while the argument has been made to numerous courts, it has largely been ignored. In fact, the court is aware of only one case in which the issue has been given anything more than a cursory acknowledgement. In *Mendoza v. INS,* 559 F. Supp. 842 (W.D.Tex. 1982) plaintiffs sought to enjoin the INS' practice of conducting "dragnet sweeps" of various bars throughout the Mexican-American section of El Paso, Texas. Plaintiffs were two bar owners and United States citizens who had been interrogated, at least in part, on the basis "of their obvious Mexican descent." *Id.,* at 845. Along with a Fourth Amendment claim, all the plaintiffs alleged that the INS' conduct violated their right to equal protection of the law.

The facts concerning the confrontations between the INS agents and the two individual plaintiffs are as follows:

> Robert Luna, an American citizen, was arrested at El Retiro. He produced valid documents establishing his citizenship, but the interrogating agent discredited their authenticity since Luna spoke no English. Luna was arrested, and detained for four hours.
>
> At Montona Village, Pascual Mendoza, an El Paso fireman and American citizen, was interrogated concerning his citizenship. Mendoza was highly offended by the interrogation and refused to cooperate. INS agents escorted him to the street where two police officers arrested him for drunk and disorderly conduct and drove him to the police station. He was not booked and no criminal proceedings were initiated as a result of the arrest. *Id.,* at 845.

The court held that the INS conduct amounted to a "seizure" of those individuals found in the bars, including the plaintiffs. The court concluded, as did the Ninth Circuit in *Surteck,* that:

> Absent consent, an INS agent may not even detain and interrogate a person believed to be an alien unless the agent has a reasonable suspicion based on articulable facts and rational inferences that the person not only is an alien but is illegally in the country. *Id.* at 847.

Applying this standard, the court granted a preliminary injunction, preventing the INS from conducting similar warrantless dragnet sweeps and "detaining to investigate the alien status of any individual as to whom the agent has not reasonable suspicion that the individual is illegally in the country." *Id.,* at 851.

The court, however, rejected the plaintiffs' equal protection claims. While it was undisputed that the INS' conduct would primarily impact on El Paso's Mexican-American community, the court concluded that "the bar owners were not denied equal protection simply because their bars and their patrons were subjected to scrutiny by the INS agents." *Id.,* at 850. Further, the court found that while "[p]laintiffs Mendoza and Roberto Luna complain that they were interrogated more vigorously than others and arrested solely because of their apparent Mexican descent, . . . their detention and interrogation were based not solely upon their heritage but on additional reasonable circumstances." *Id.* Moreover, the court stated that there was no evidence that even suggested that the INS "formulated their plan for the area control operation for the purpose of denying any Mexican-American equal protection of the law. Discriminatory intent must be shown to recover for denial of equal protection. *See Washington v. Davis,* 426 U.S. 229 (1976)." *Id.*

In the instant action, it is abundantly clear that no individual was forcefully detained or interrogated. Moreover, the questioning that did occur was not based solely upon these individual's ethnic appearance but upon other "reasonable circumstances" including their apparent illegal registration.

Based on the foregoing, the court concludes that plaintiffs' equal protection causes of action against all defendants should be dismissed. For the same reasons, plaintiffs Fifteenth Amendment claims should be dismissed.

IV.

Plaintiffs' Voting Rights Act cause of action must also be dismissed. Plaintiff cites no authority which indicates that the Act has any application to a voting fraud investigation initiated by the federal government. Finally, the court finds that plaintiffs' First Amendment right of association cause of action must be dismissed. The minimal intrusion imposed by defendants' conduct was clearly outweighed by the government's interest in preventing voter fraud. Moreover, to the extent that plaintiffs allege defendants' actions "chilled" their First Amendment rights merely by conducting the investigation, the complaint must be dismissed for failure to state a claim. *Laird v. Tatum,* 408 U.S. 1 (1972).

V.

The court has considered the remainder of plaintiffs claims and arguments and found them unpersuasive. Accordingly, the action shall be dismissed and judgment entered in favor of the defendants.

IT IS SO ORDERED.

Date: SEP 12 1983

/s/ SPENCER WILLIAMS

United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 2102 SW

JOSE J. OLAGUES ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

[Filed May 24, 1982]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT RUSSONIELLO'S MOTION TO DISMISS

Defendant Joseph Russoniello's motion to dismiss came on before the court on May 24, 1982 at 9:30 am. After careful consideration of the arguments of counsel, the court hereby grants in part and denies in part the motion to dismiss.

In so much as plaintiffs' complaint seeks injunctive relief against defendant Russoniello, defendant's motion is granted. The court finds that, as a matter of law, it has no jurisdiction to enjoin or otherwise control a preliminary investigation of the U.S. Attorney's office. *See, Jett v. Castenada,* 578 F.2d 842 (9th Cir. 1978).

In so much as plaintiffs' complaint seeks damages for violations of their constitutional rights, defendant Russoniello's motion to dismiss is denied. The court finds that to the extent defendant Russoniello is engaged in investigative activities, he enjoys only a good-faith qualified immunity from damage awards comparable to that extended to other law enforcement officials. *Robichaud v. Ronan,* 351 F.2d 533 (9th Cir. 1965); *Jacobson v. Rose,*

592 F.2d 515, 524 (9th Cir. 1978). Plaintiffs' complaint alleges that present injury to their constitutional rights have resulted from defendant Russoniello's investigation. This allegation is sufficient to defeat a motion to dismiss.

Since the court has dismissed the injunctive aspects of plaintiffs' complaint, the presently scheduled hearing on plaintiffs' motion for preliminary injunction is hereby vacated.

IT IS SO ORDERED.

Dated: May 24, 1982

/s/ SPENCER WILLIAMS

United States District Judge

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40119